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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

EDITH DAVIS, Individually, and as Next Friend of JANE DOE, Individually; DIANNA COLTON, Individually, and as Next Friend of JANE DOE, Individually; and VICKI LINDSEY, Individually, and as Next Friend of JANE DOE, Individually,

Petitioners,

v.

DEKALB COUNTY SCHOOL DISTRICT,
a Local Education Agency (LEA),

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq*. ("Title IX") states, in pertinent part, the following: "No person . . . shall, on the basis of sex, . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." 20 U.S.C. § 1618 (a). Since 1982, this Court has interpreted the text of Title IX by according it a sweep as broad as its language. *See North Haven Board of Education v. Bell*, 456 U.S. 512 (1982). Subsequently, this Court held in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992) that a student who has been sexually harassed by a teacher is entitled to recover damages from the school district. Thereafter, this Court determined that the general standard for a school's liability for teacher-on-student sexual harassment under Title IX turned on the existence of 1) actual notice to an appropriate person and 2) deliberate indifference. *Gebser v. Lago Independent School District*, 524 U.S. 274 (1998); *see also Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). The Eleventh Circuit, however, held in this case that a twelve-year-old school girl's complaint of inappropriate touching by her teacher to the principal and other school officials was not actual notice and that the principal's and other school officials' violation of school sexual harassment policy and state law in responding to the student's complaint of sex-based discrimination did not constitute deliberate indifference. Therefore, the questions presented are:

1. Whether a student's complaint of inappropriate touching by her teacher to the principal and other school officials in a school receiving federal financial assistance, where the principal acknowledged that the student's

complaints were in the nature of sexual harassment, constitutes the requisite evidence necessary to create a jury question, as a matter of law, on the existence of actual notice of discrimination in a school's programs or activities under Title IX?

2. Whether a principal in a school receiving federal financial assistance, who has substantial control over a teacher who sexually harasses a student, is an "appropriate person" for receipt of actual notice of sex-based discrimination under Title IX?

3. Whether a school principal's and other school officials' violation of school sexual harassment policy and state law, in responding to a student's complaint of sex-based discrimination, constitutes the requisite evidence necessary to create a jury question as a matter of law on the existence of deliberate indifference under Title IX?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents iii

Table of Cited Authorities v

Table of Appendices viii

Opinions Below 1

Statement of Jurisdiction 1

Statutory Provisions 1

Statement of the Case 1

1. Introduction 1

2. The Malissia Burrell Incident 2

3. Sexual Abuse of Stephanie, Shun'Tae and Latonya 9

    a. Stephanie Hawkins 9

    b. Shun'Tae Oubre' 10

    c. Latonya Colton 11

4. Mency's Conviction 12

Contents

Page

5. Petitioners Civil Actions 13

6. Stay of Court's Mandate 14

Reasons for Granting the Writ 14

I. The Text of Title IX and its Legislative History, This Court's Precedent and the Policy Guidance Provided by the Department of Education Mandate Institutional Liability for School Districts Which Fail to Eradicate a Hostile Educational Environment of Which They Have Actual Notice 16

II. The Standard for Institutional Liability for Teacher-on-Student Sexual Harassment Under Title IX Remains Unclear 18

A. Actual Notice to an Appropriate Person 20

B. Deliberate Indifference 22

Conclusion 28

TABLE OF CITED AUTHORITIES

Page

Cases:

Brown v. Hot, Sexy & Safer Productions, 68 F.3d 525 (1st Cir. 1995) 20

Cannon v. University of Chicago, 441 U.S. 677 (1979) 17

Canty v. Old Rochester Regional School District, 66 F. Supp.2d 114 (D. Mass. 1999) 23

Davis v. Monroe County Board of Education, 526 U.S. 629 (1999) . . . . *passim*

Doe v. School Admin. Dist. No. 19, 66 F. Supp.2d 57 (D.Me. 1999) 20, 22, 23

Floyd v. Waiters, 133 F.3d 786 (11th Cir. 1998) . . . 13

Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992) . . . . i, 13, 16, 17, 26

Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998) . . . . *passim*

Murrell v. School District No. 1, 186 F.3d 1238 (10th Cir. 1999) 22, 23

North Haven Board of Education v. Bell, 456 U.S. 512 (1982) . . . . i, 17, 27

Page

State of Georgia v. Kelvin D. Mency Case No. :95CR2318-8 12

United States v. Price, 383 U.S. 787 (1966) 17

Vance v. Spencer County Public School District, 231 F.3d 253, 262 (6th Cir. 2000) 22

United States Constitution:

Eleventh Amendment 15, 16

Statutes:

20 U.S.C. § 1681 *et seq*. . . . . i, 1

20 U.S.C. § 1681(a) . . . . i, 17

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 13

28 U.S.C. § 1343(3)(4) 13

42 U.S.C. § 2000d-7 16

O.C.G.A. § 19-7-5 . . . . 1, 5, 21, 23, 24

Pub. L. 100-259, 102 Stat. 28 16

Cited Authorities

Page

Rule:

Federal Rule of Appellate Procedure 41 14

Other Authority:

62 Fed.Reg. 12034 (1997) 17, 18, 24

TABLE OF APPENDICES

Page

Appendix A — Per Curiam Opinion Of The United States Court Of Appeals For The Eleventh Circuit Dated And Filed November 24, 2000 . . . . 1a

Appendix B — Order Of The United States District Court For The Northern District Of Georgia, Atlanta Division In *Davis, et al. v. Dekalb County School District, et al.*, Civil Action No. 1:96-CV-2845-TWT Dated And Filed March 12, 1998 . . . . 19a

Appendix C — Order Of The United States District Court For The Northern District Of Georgia, Atlanta Division In *Colton, et al. v. Dekalb County School District, et al.*, Civil Action No. 1:97-CV-0491-TWT Dated And Filed March 12, 1998 . . . . 33a

Appendix D — Order Of The United States District Court For The Northern District Of Georgia, Atlanta Division In *Lindsey, et al. v. Dekalb County School District, et al.*, Civil Action No. 1:97-CV-0382-TWT Dated And Filed March 12, 1998 . . . . 45a

Appendix E — Per Curiam Order Of The United States Court Of Appeals For The Eleventh Circuit Denying Petition For Rehearing Dated And Filed January 8, 2001 . . . . 58a

Appendix F — Relevant Statute 61a

Appendix G — School Policy 66a

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The district court's opinion (per Thrash, D.J.) granting respondent's summary judgment motion as to Edith Davis, as legal guardian on behalf of Jane Doe, individually, (Appendix ("Pet. App.") Pet. App. 19a-32a) is published at 996 F. Supp. 1478. The district court's opinions granting respondent's summary judgment motions as to Dianna Colton, individually, and as legal guardian on behalf of Jane Doe, individually, (Pet. App. 33a-44a) and Vicki Lindsey, individually, and as legal guardian on behalf of Jane Doe, individually, (Pet. App. 45a-57a) are not published. The court of appeals' opinion (per curiam Cox, Black and Fay, C.J.) denying petitioners consolidated appeal (Pet. App. 1a-18a) is published at 233 F.3d 1367.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on November 24, 2000, and denied rehearing (Pet. App. 58a-60a) on January 8, 2001. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The provisions of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* are reprinted in the Appendix at 61a-65a.

STATEMENT OF THE CASE

1. Introduction

Knollwood Elementary School ("Knollwood") is a federally assisted educational institution in the respondent

DeKalb County School District ("DCSD") in Decatur, Georgia. Petitioners are three former school girls who were repeatedly raped and molested by their Knollwood physical education teacher, Kelvin D. Mency ("Mency"), on school grounds, including, but not limited to, at least two instances in the adult bathroom adjacent to the principal's office, and during school days in the 1993-94 school year. At the time of their abuse, petitioners were twelve and thirteen years old and in their seventh grade year.

2. The Malissia Burrell Incident

In approximately November, 1993, Mency was playing touch football with his students during after school P.E. Mency always played quarterback and regularly patted his students on the behind. On one afternoon, Mency instructed one of his students, Malissia Burrell, to move closer to him as she hiked the football. As Malissia moved closer to Mency, he inappropriately fondled her buttocks.[1]

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[1] Burrell testified that:

A. We was at after-school P.E., and we were playing touch football and I hiked the ball to Coach Mency and he touched my behind.

Q. Could you describe exactly . . . the type of touching that occurred?

A. Like I was hiking the ball and he would like come on, you come back further and all that, and I hiked the ball to him and he felt on my behind.

Q. **Did that make you angry?**

A. **Yes.**

Q. **And why did that make you angry?**

A. **Because he a teacher, he don't supposed to be touching on me.**

(Cont'd)

After the game, as Malissia attempted to get water from a water fountain inside the school, Mency walked by her and attempted to touch her again by placing his hands down her pants.

That night, Malissia went home and told her mother, Helen Davis (no relation to petitioner Edith Davis), that Mency had touched her in an inappropriate manner. The next day, prior to the beginning of school, Ms. Davis brought her daughter, Malissia, to the school to voice her complaints to Principal William Duncan ("Duncan"). Ms. Davis made it clear that her daughter was complaining about inappropriate touching and stated that "Mency [had] been fondling with [her] daughter." (Duncan Depo. at 70.) At the time he received the complaint from Ms. Davis, Principal Duncan had the general impression that the accusations being made by Malissia Burrell and her mother would fall within the area of sexual harassment, and he reported same to his direct supervisor, Area Executive Director Dr. Roosevelt Daniels ("Daniels"), who, according to Duncan, agreed.[2] (Duncan Depo. at 87.)

(Cont'd)

Q. **Did you perceive that his touching you was an accident or did you believe that it was intentional?**

A. **Intentional.**

(Burrell Depo. at 13-15 (emphasis added).) Therefore, it is clear from a review of Burrell's testimony that: 1) she complained about more than a slight touching during a football game, and 2) she clearly indicated that Coach Mency's conduct was inappropriate in that it was "intentional" and that it made her angry "because he a teacher, he don't supposed to be touching on me." Moreover, Burrell reported this information to her mother (Burrell Depo. at 19, lines 11-15), to Principal Duncan (Burrell Depo. at 19, lines 20-24), to Ms. Butler (Burrell Depo. at 21, lines 8-13) and to the school social worker. (Burrell Depo. at 22, lines 6-18.)

[2] There is a conflict in the testimony of Duncan and Daniels. Duncan testified that he informed Daniels that Burrell's allegations

(Cont'd)

While Duncan admitted that he was not sufficiently familiar with the school policy for addressing these allegations, he chose *not* to refer to the school's sexual harassment guidelines at the time Ms. Davis brought her daughter's complaints forward.[3] (Duncan Depo. at 87.) Instead, Duncan selected his social worker, Corrie Wingfield ("Wingfield") and the school counselor, Yvonne Butler ("Butler") to talk to the victim and one other student. Duncan claims that he made it imminently clear to Butler that he viewed Malissia Burrell's complaints of sexual harassment to be very serious. Nevertheless, Duncan did not set any standards for this inquiry and neither Daniels nor Duncan gave any specific direction to Butler or Wingfield about how to conduct these interviews.[4] (Duncan Depo. at 89-90.)

After this allegation was reported to Duncan, he never started a file on this matter. He did not take notes from any of the meetings, and he did not understand that there needed to be anything placed in writing. While Duncan felt that the

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(Cont'd)

were of a sexual nature. (Duncan Depo. at 87.) Daniels denies that he was so informed. (Daniels Depo. at 153.) This discrepancy should have been submitted to a jury, as discussed *infra*, to determine the credibility of these two school officials and whether Duncan's failure to report Burrell's complaints of sexual harassment was evidence of deliberate indifference to actual notice of complaints of sex-based discrimination.

[3] The undisputed testimony of seventh grade teacher Sandra Cheatham is that Duncan never explained to the faculty any policy addressing complaints of sexual harassment by students against teachers. (Cheatham Depo. at 42.)

[4] Yvonne Butler and Corrie Wingfield both interviewed Malissia Burrell in November 1993 and made written notes. Neither Wingfield nor Butler transmitted any written records of interview to Principal Duncan in November 1993. Corrie Wingfield even testified that she *shredded* the notes which she made in November 1993. (Wingfield Depo. at 52.)

allegations were extremely serious, he did not know that there was a requirement to keep a written record in order to preserve the events as they were being discovered. (Duncan Depo. at 109.) In fact, he never secured a written statement from Mency or the Complainant, Malissia Burrell. (Duncan Depo. at 13.) Duncan also failed to notify any police authority, including Police Officer Glen Jefferson, who had been working as a mentor for students at Knollwood Elementary School since at least as early as 1989. (Jefferson Depo. at 12.) DeKalb County school policy (Pet. App. 66a-69a)[5], however, required that the principal take a written complaint from the complainant and the alleged harasser and that a school-level investigation be conducted in cooperation with police authorities.[6] Official Code of Georgia § 19-7-5, which is expressly referenced in the school policy, also requires that a report be made to a child welfare agency or an appropriate police authority or district attorney.[7]

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[5] Respondent's school policy is set forth in a document entitled *Dealing with Allegations by Students or Parents of Misconduct by Staff Members*. The court of appeals stated ". . . we question whether these guidelines were in effect when Burrell lodged her complaint in November of 1993." Pet. App. 13a. Principal Duncan's undisputed testimony, however, is that the only change in the school's policy from 1993 to 1994 concerned contacting the school detective. (Duncan Depo. at 75.) Therefore, there is undisputed evidence that, with the exception of this one issue, the exact same policy was in effect in 1993. At a minimum, the court of appeals' question should have been resolved by a jury.

[6] School Policy states "[t]he principal will cooperate fully with police authorities in their investigation."

[7] O.C.G.A. § 19-7-5 defines sexual abuse as "physical contact in an act of apparent sexual stimulation or gratification with any person's clothed or unclothed . . . buttocks. . . ." This statute also requires that school administrators and teachers report child sex abuse to a child welfare agency or an appropriate police authority or district attorney.

After the allegations were reported to Duncan by Ms. Davis, Duncan met privately with Mency. Duncan, however, did not record this interview or reduce any portion of the interview to writing. Duncan explained to Mency that they were going to meet with Ms. Davis and her daughter, Malissia Burrell. (Duncan Depo. at 131-132.) Duncan then had a meeting with Malissia Burrell, Ms. Davis, Ms. Butler and included Kelvin Mency. Duncan contends that he reported to Dr. Daniels that he was going to have such a meeting and that Daniels had approved the meeting. (Duncan Depo. at 139-140.) Strangely, however, Dr. Daniels admitted that any meeting which included the twelve-year-old girl, Malissia Burrell, and the alleged perpetrator, Kelvin Mency, would be "stupid" and violate DeKalb County policy with regard to investigating complaints of sexual harassment by a student against a teacher.[8] Daniels could not, however, explain how it was possible that a meeting of this nature was conducted by Principal Duncan. (Daniels Depo. at 73-80.) Moreover, the fact that Daniels disputed Duncan's asertion weighs heavily against Duncan's credibility and provides evidence of his indifference.

When Malissia reported that Mency had touched her inappropriately on her behind when she was centering the ball and that he tried to put his hands in her pants, Mency denied that he had in any way tried to touch Malissia. (Duncan Depo. at 147.) While Duncan perceived that Malissia's complaint was of a touching of an improper nature by

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[8] In response to the evidence that Duncan violated DeKalb County policy by interrogating Burrell in the presence of Mency, the court of appeals stated: "Although one could argue that this approach was not wise, that is not the question before us." Pet. App. 15a. However, whether this approach was wise was precisely the question before the Eleventh Circuit because "this approach" was evidence of deliberate indifference. Dr. Daniels admitted, without dispute, that "this approach" was not only "stupid," but that it violated DeKalb County policy.

Mency, Duncan did not believe the story which Malissia reported in Mency's presence and instead accepted Mency's denial.[9] (Duncan Depo. at 157-59.) Malissia's mother, Ms. Davis, however, did not agree with Duncan's conclusion and told him that she was not happy with his findings, (Duncan Depo. at 160), and that she wanted Mency fired. (H. Davis Depo. at 6.)

After this meeting, Mency perceived that the matter was concluded and that he was absolved of any wrongdoing. (Mency Depo. of July 10, 1997 at 107.) Furthermore, Dr. Daniels felt that the matter had been investigated and also believed that it was concluded. Dr. Daniels never made any further efforts to confer with Principal Duncan to ensure that there were no further allegations of inappropriate conduct on the part of Kelvin Mency nor did he receive any written materials from the investigation. (Daniels Depo. at 51 and 63-64.) DeKalb County school policy, however, required that Duncan provide a written summary of all interviews to Dr. Roosevelt Daniels as the Area Executive Director. Pet. App. 67a.

Subsequently, Duncan spoke with Burrell on three or four occasions throughout the remainder of the school year, but did not remember doing anything else about her complaint. Neither the faculty nor the school detective was contacted or informed about the allegations of sexual misconduct on the part of Kelvin Mency. Duncan did not interview any teachers about Mency's conduct. He did not make any inquiry whether any teachers had observed Mency engaging in inappropriate conduct. He did not interview any students to inquire into Mency's conduct.[10] Moreover, Duncan failed to direct anyone to monitor Mency to observe his conduct and to determine if he was alone with any female students. (Duncan Depo. at 164-67.)

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[9] Malissia Burrell testified that she was fearful of Mency and that she was afraid to come to school for the rest of the year after complaining about Mency because she was not the only person that Mency "messed with like that." (Burrell Depo. at 25.)

According to Principal Duncan, Mency had the right to take students out of teachers' classrooms even without a note being prepared by Mency. (Duncan Depo. at 170.) In fact, Mency took students out of other teachers' classrooms on numerous occasions. Seventh-grade teacher Sandra Cheatham testified that Mency took petitioners Stephanie Hawkins and Shun'Tae Oubre' and other students out of her classroom throughout the 1993-94 school year. Further, Mency continued to take Stephanie Hawkins out of Ms. Cheatham's classroom, notwithstanding that Stephanie's guardian, Edith Davis, complained to both Ms. Cheatham and Principal Duncan that she did not want Stephanie taken out of class anymore.[11] (E. Davis Depo. at 68-69; Cheatham

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[10] It is undisputed that students were aware of Mency's harassment during the school year. Student Kim Wade witnessed petitioner Shun'Tae Oubre' and Mency exiting the adult bathroom next to Principal Duncan's office and saw Mency touching girls in an inappropriate fashion. (Jefferson Depo. at 33; Wade Depo. at 18-19, 45 and 55-56.) Malissia Burrell testified that she was not the only one that Mency "messed" with (Burrell Depo. at 24-25) and that Shun'Tae Oubre' told Malissia about Mency's inappropriate conduct toward Shun'Tae every couple of weeks throughout the school year. (Burrell Depo. at 27-29.)

[11] On one occasion, subsequent to Edith Davis informing the school that she did not want Stephanie Hawkins taken out of class anymore, Stephanie did not return to Ms. Cheatham's class. Ms. Cheatham had to call Edith Davis because Stephanie could not be located. Ultimately, Stephanie returned to Ms. Cheatham's classroom, however, Ms. Cheatham never sought to ascertain Stephanie's whereabouts. (Cheatham Depo. at 102-104.) While Sandra Cheatham claims she reported this incident to Duncan, Principal Duncan claims he did not know and that he never knew that Mency took students out of other teachers' classrooms. (Cheatham Depo. at 104, lines 2-3; Duncan Depo. at 169.)

Depo. at 108.) Also, on one occasion subsequent to the time when Malissia Burrell reported Mency's sexual harassment to Duncan, Ms. Cheatham observed Mency chasing Shun'Tae Oubre' into Ms. Cheatham's classroom at which point he grabbed her, tickled her on the floor and carried her out of Ms. Cheatham's classroom over his shoulder. (Cheatham Depo. at 24-25.)

3. Sexual Abuse of Stephanie, Shun'Tae and Latonya

During the 1993-94 school year (***the same year and following Malissia Burrell's complaints about Mency***), petitioners Latonya Colton, age twelve, Shun'Tae Oubre', age twelve, and Stephanie Hawkins, age thirteen, were repeatedly molested by Mency at Knollwood. During their sixth-grade and seventh-grade years, Mency served as their physical education teacher. In addition, Mency was the faculty sponsor for the safety patrol of which Stephanie Hawkins and Latonya Colton were members.

a. *Stephanie Hawkins*

During her seventh-grade year (1993-94), Mency repeatedly called Stephanie out of class throughout the school year. On a rainy day during Stephanie's seventh grade year (***the same year in which Malissia Burrell complained about Mency***), Mency took Stephanie to the teachers' bathroom which is located adjacent to the **Principal's office in Knollwood**. Mency began kissing Stephanie and touching her under her overalls, and then molested and sodomized her. Subsequently, Mency sodomized Stephanie on two separate occasions in the school's equipment room, which is located beside the school cafeteria. (Hawkins Depo. at 132-44.)

Another time, Mency kissed Stephanie in a storage facility where the school's lawn mowers were kept. (Hawkins Depo. at 146-47.) On still another occasion, Mency took

Stephanie to an empty classroom during school and began kissing her and unzipped his pants and inserted his penis into Stephanie's mouth and ejaculated in her presence. (Hawkins Depo. at 148-49.) During the same school year and on another occasion, Stephanie was on her way to the school cafeteria when Mency took Stephanie outside the seventh-grade hall and began kissing her and placed his mouth on her breasts. (Hawkins Depo. at 152-55.)

On yet another occasion, Stephanie was walking away from the school library when she encountered Mency. Mency asked Stephanie for a piece of gum, but the only piece of gum Stephanie had was the one which she was chewing. So, Mency began kissing Stephanie in the hallway and removed Stephanie's gum from her mouth with his own mouth. (Hawkins Depo. at 156-57.)

b. *Shun'Tae Oubre'*

Sometime during the middle of the same school year after Christmas, Mency approached Shun'Tae Oubre' during a PTA meeting and took her to the Special Education room on the seventh-grade hall. Here, Mency began kissing her with an open mouth and touching Shun'Tae's body and buttocks. (Oubre' Depo. at 42-56.)

On another occasion, Mency took Shun'Tae to the school equipment room, which was on a hallway near the school cafeteria and the school office. Mency then proceeded to kiss Shun'Tae and asked her to masturbate him. When Shun'Tae refused, he began masturbating himself. Mency ejaculated in Shun'Tae's presence and Shun'Tae testified that "after semen came out, he cleaned it up." When Mency was finished, he sent Shun'Tae back to class. (Oubre' Depo. at 62-69.)

In early May 1994, Mency took Shun'Tae to the adult restroom **(the same restroom in which he sodomized**

Stephanie Hawkins), which was adjacent to Principal Duncan's Office. Mency then began kissing Shun'Tae on the mouth and touching her buttocks and her breasts. Mency began unbuttoning his pants and tried to have sex with Shun'Tae. He placed his hands under Shun'Tae's outfit and began rubbing her vagina. Additionally, he placed Shun'Tae's hand on his penis. Shun'Tae removed her hand from his penis, and removed Mency's hand from her vagina and exited the adult restroom. (Oubre' Depo. at 73-84.)

On yet another occasion, Shun'Tae went to Knollwood to visit her teacher, Ms. Cheatham, and accidentally left her keys at the school. On the next day, she returned to the school to retrieve her keys and, as she was walking home, Coach Mency was leaving the school in his car. He approached Shun'Tae, who was walking home, and asked her if she wanted a ride. Instead of taking Shun'Tae home, Mency drove to a church parking lot where he began kissing Shun'Tae and rubbing her vagina. (Oubre' Depo. at 92-98.)

c. *Latonya Colton*

One morning before the beginning of school during this same school year (1993-94), Mency led Latonya out of the school building to the flagpole. Mency then turned toward Latonya and while he used one hand to hold up her skirt, he used his other hand to move her undergarments out of the way in an effort to touch her vagina. (L. Colton Depo. at 46-51.)

On another occasion between the middle and end of the school year, approximately two months later, Mency followed Latonya in from physical education class and began touching Latonya's buttocks. Latonya hit Mency's hand, told him to move and she went inside the building. (L. Colton Depo. at 60-63.)

On yet another occasion, at the end of physical education class, Mency attempted to place his hands inside Latonya's shirt in order to touch her breasts. This incident took place after Christmas break, which was during the second half of the school year and was after Malissia Burrell had reported her allegations of inappropriate sexual conduct by Mency to the school and Principal Duncan. (L. Colton Depo. at 66.)

At the end of the school year during which Mency repeatedly sodomized and/or molested at least four girls, all thirteen or younger, throughout the school year, on school grounds and during the school day, Principal Duncan gave Coach Mency a very favorable review and did not make any reference to the inquiry into the allegations of Mency's inappropriate sexual conduct, which was precipitated by Malissia Burrell's complaint in November 1993. (Duncan Depo. at 248-49; Mency Depo. of July 10, 1997 at 103.) Ultimately, in September 1994, another student, not the principal or other school officials, reported Mency's conduct to Police Officer Glen Jefferson, the school mentor, and Mency was subsequently arrested.

4. *Mency's* Conviction

As a consequence of the repeated sexual transgressions Mency was accused of committing on Knollwood school grounds during the school day in the 1993-94 school year, Mency was indicted on three counts of aggravated child molestation, eight counts of child molestation, statutory rape and criminal attempt to commit child molestation. Mency was convicted by a jury on one count of child molestation for engaging in an immoral and indecent act with Stephanie, on five counts of child molestation for engaging in immoral and indecent acts with Shun'Tae and on one count of criminal attempt to commit child molestation with Latonya in *State of Georgia v. Kelvin D. Mency* Case No.: 95CR2318-8. For his sexual transgressions, Mency was sentenced to serve 20 years in prison to be followed by 10 years on probation. He is currently incarcerated at Dooley State Prison.

5. Petitioners Civil Actions

Subsequent to their abuse, petitioners filed civil actions alleging, among other things, a violation of Title IX against respondent and invoking the jurisdiction of the district court pursuant to Title 28 U.S.C. §§ 1331 and 1343(3)(4). The district court determined that, under *Floyd v. Waiters*, 133 F.3d 786 (11th Cir. 1998), "there must be actual notice of the sexual harassment to the school board or to the school superintendent in order for there to be a claim against the school system under Title IX." Essentially, this inquiry ended the analysis for the district court. The district court dismissed petitioners Title IX claims because the court determined that there had been no actual notice of sexual harassment to the school board or the school superintendent.

On appeal, petitioners objected to the district court's analysis under *Floyd* contending that this case did not set forth the correct legal standard for the institutional liability of a school district under Title IX. The Eleventh Circuit did not directly address petitioners' claims that the district court had employed the incorrect standard of liability. Instead, the Eleventh Circuit noted that after the district court granted summary judgment, this Court set forth general parameters under which a school district may be held liable under Title IX for a teacher's sexual harassment of a student. *See Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998); *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). The Eleventh Circuit reasoned that in light of *Gebser*, petitioners must demonstrate actual notice of sexual harassment to an appropriate person and deliberate indifference in order for liability to attach to the school. In an opinion inconsistent with the legislative policy underlying Title IX and the jurisprudence established by this Court in *Franklin* and its progeny, the Eleventh Circuit determined that the unequivocal evidence that a twelve-year-old girl and her mother informed the principal that her teacher had touched her inappropriately on her buttocks at school did not constitute actual notice to the school district of sexual harassment. Further, the Eleventh Circuit determined, contrary to the courts which have addressed the issue since *Davis*, that the school's subsequent failure to comply with school policy and state law in responding to this complaint did not constitute deliberate indifference or, at the minimum, create a jury issue.

6. Stay of Court's Mandate

On January 31, 2000, the Eleventh Circuit granted a stay of its mandate upon a showing by petitioners that a certiorari petition would present a substantial question meriting this Court's review and that there existed good grounds for a stay. *See* FRAP 41.

This petition for a writ of certiorari followed so that this Court may review a matter of great public importance to families and their children all over the United States regarding the responsibility of federally-assisted educational institutions to protect children from repeated sexual abuse by their teachers on school grounds during the school day.

REASONS FOR GRANTING THE WRIT

The petition should be granted because the court of appeals' decision conflicts with this Court's jurisprudence regarding the "actual notice" standard under Title IX. Also, this petition should be granted because the court of appeals' decision regarding the standard for "deliberate indifference" is inconsistent with the other courts that have addressed this issue since *Davis* and purports to decide important questions of federal law that have not been, but should be, settled by this Court regarding the parameters of the deliberate indifference standard in a Title IX claim of teacher-on-student sexual harassment. While *Gebser* and *Davis* set forth general undefined elements that narrow the window for a school district's liability, the Eleventh Circuit has analyzed these elements in a way that establishes a dangerous precedent! The Eleventh Circuit's decision renders a Title IX cause of action inutile and leaves school districts devoid of responsibility for protecting school children from repeated sexual abuse by their teachers on school grounds throughout the school year.

The strict limitation under which the Eleventh Circuit analyzed "actual notice" and "deliberate indifference" is not consistent with the express intent of the Congress of the United States, which specifically 1) amended Title IX to broaden its coverage and to waive Eleventh Amendment immunity and 2) empowered the Office of Civil Rights, through the Department of Education, to enact regulations and policy guidance. Significantly, this Court has given deference to this policy guidance, *see Davis*, 526 U.S. at 647-48, in analyzing a school district's liability to a student who, as in this case, was repeatedly sexually harassed on school grounds during the school day.

Furthermore, this Court has acknowledged that

> [t]he number of reported cases involving sexual harassment of students in schools confirms that harassment unfortunately is an all too common aspect of the educational experience. No one questions that a student suffers extraordinary harm when subjected to sexual harassment and abuse by a teacher, and that the teacher's conduct is reprehensible and undermines the basic purposes of the educational system.

Gebser, 524 U.S. at 292 (1998). For these very reasons and because the circumstances giving rise to these cases continue to permeate our society and the legal system, this Court should grant this petition to clarify the responsibility of school districts in protecting students from repeated sexual abuse by their teachers, on school grounds, during the school day. This Court has previously recognized the pervasiveness of this type of abuse and the severity of the impact to the abused student. Accordingly, this Court should grant this petition in order to delineate a framework under the law which will apportion the risk of sexual abuse between children and schools in a way that will promote the eradication of, rather than the perpetuation of, cases of teacher-on-student sexual abuse. Finally, this Court should grant this petition to ensure that our nation's public schools do not continue to be traps for unwary children and breeding grounds for pedophiles.

I. The Text of Title IX and its Legislative History, This Court's Precedent and the Policy Guidance Provided by the Department of Education Mandate Institutional Liability for School Districts Which Fail to Eradicate a Hostile Educational Environment of Which They Have Actual Notice

In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), this Court concluded that Title IX authorized a high school student who had been sexually harassed by her teacher to recover damages from the school district. The *Franklin* opinion was largely predicated upon two amendments to Title IX which included the Rehabilitation Act Amendments of 1986, 100 Stat. 1845, 42 U.S.C. § 2000d-7 (through which Congress abrogated the states' Eleventh Amendment immunity under Title IX) and the Civil Rights Restoration Act ("CRRA") of 1987, Pub. L. 100-259, 102 Stat. 28 (through which Congress broadened the coverage of Title IX). *Franklin*, 503 U.S. at 72. Thus, the private cause of action seeking an award of damages under Title IX has been condoned by Congress and this Court.

Further, this Court has previously determined that the text of Title IX should be accorded "a sweep as broad as its language." *North Haven Board of Education v. Bell*, 456 U.S. at 521 (1982) (quoting *United States v. Price*, 383 U.S. 787 (1966)). The text of Title IX is very broad: "No person . . . shall, on the basis of sex, . . . be subjected to discrimination under any education program or activity receiving federal financial assistance. . . ." 20 U.S.C. § 1681(a). The focus of this sweeping language is on the victim of discrimination rather than the wrongdoer and gives Title IX very broad coverage.

Respondent's duty under Title IX constitutes an affirmative undertaking that is far more significant than a mere promise to obey the law because respondent assumed the statutory duty set out in Title IX as part of its consideration for the receipt of federal funds. *See Cannon v. University of Chicago*, 441 U.S. 677, 691-93 (1979). These considerations were clearly addressed by this Court in *Franklin*. *Franklin*, 503 U.S. at 75. Thus, *Franklin* stands for the proposition that damages are recoverable from the school because sexual harassment of a student by a teacher violates the affirmative duty that a school district has not to discriminate on the basis of sex.

In fact, the United States Department of Education ("Department"), through its Office for Civil Rights, has issued policy guidance stating that a school district is liable under Title IX if one of its teachers "was aided in carrying out the sexual harassment of students by his or her position of authority with the institution." Dept. of Education, Office for Civil Rights, Sexual Harassment Policy Guidance: Harassment of Students by School Employees, Other students or Third parties, 62 Fed.Reg. 12034, 12039 (1997). As Congress has established that the Department of Education is the agency responsible for administering and enforcing Title IX, the Department has a special interest in ensuring that federal funds are not used in violation of Title IX's prohibition against sex discrimination.

Significantly, the Department's interpretation of Title IX supports the conclusion that respondent is liable in damages for Mency's sexual abuse of petitioners, which was made possible by Mency's affirmative misuse of his authority as petitioners' teacher. Given this guidance by the agency responsible for administering Title IX, a student's (and her mother's) complaint of sexual harassment by her teacher to the principal should certainly be sufficient to constitute the requisite actual notice to the school district of sex-based discrimination in its programs or activities for purposes of establishing "actual notice" under Title IX.

Additionally, and in keeping with the guidance of the Office of Civil Rights, Title IX requires analyzing the reasonableness of the school district's response to "actual notice." In describing a school district's response to sexual harassment, the Office of Civil Rights Title IX guidelines state that schools "should take immediate and appropriate steps to investigate or otherwise determine what occurred and take steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created **and prevent harassment from occurring again**." Dept. of Education, Office for Civil Rights, Sexual Harassment Policy Guidance: Harassment of Students by School Employees, Other students or Third parties, 62 Fed. Reg. 12034, 12042 (1997) (emphasis added). Respondent's failure to comply with its own sexual harassment policy and state law, which resulted in a hostile educational environment and continued harassment, should constitute evidence of "deliberate indifference."

II. The Standard for Institutional Liability for Teacher-on-Student Sexual Harassment Under Title IX Remains Unclear

In *Gebser*, this Court attempted "to delimit the circumstances in which a damages remedy should lie" under Title IX. *See Gebser*, 524 U.S. at 284. Nonetheless, this Court held that "actual notice" to an "appropriate person" of teacher-on-student discrimination would be sufficient to trigger the institutional liability of a school district on a Title IX sexual harassment claim. *Gebser*, 524 U.S. at 290. An "appropriate person" under Title IX is "at a minimum an official of the recipient entity with authority to take corrective action to end the discrimination." *Id*. According to *Gebser*, the standard for a school's institutional liability on a Title IX sexual harassment claim is based upon "actual notice" and a failure to adequately respond which amounts to "deliberate indifference." *Id*. In considering whether an "appropriate person" had the requisite notice of a teacher's sexual harassment/discrimination of a high school student, this Court stated:

> The only official alleged to have had information about [the perpetrator's] misconduct is the high school principal. That information, however, consisted of a complaint from parents of other students charging only that [the perpetrator] had made inappropriate comments during class, **which was plainly insufficient to alert the principal to the possibility that [the perpetrator] was involved in a sexual relationship with a student.**

Id. at 291 (emphasis added). So, in the aftermath of *Gebser*, the question with which lower courts were left to grapple is what constitutes "actual notice" and "deliberate indifference" and who is an "appropriate person"[12] under Title IX?

Subsequently, this Court attempted to delineate these standards in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). In *Davis*, this Court held that student-on-student Title IX sexual harassment is actionable and determined that sexual harassment complaints made by a student and her mother to the teacher and principal constituted actual notice. *Davis*, 526 U.S. at 654. This Court also stated that schools may be liable under Title IX if they "are deemed 'deliberately indifferent' to acts of . . . harassment only where the [school's] response to the harassment or lack thereof is clearly unreasonable **in light of the known circumstances.**" *Davis*, 526 U.S. at 648 (emphasis added).

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[12] The Eleventh Circuit was unable to determine who is an "appropriate person" and stated "[w]e . . . leave for another day the task of delineating *Gebser's* 'appropriate person.'" Pet. App. 8a.

Thus, *Gebser* and *Davis* set forth broad parameters for a school district's liability under Title IX, but do not clarify for lower courts what "actual notice" to an "appropriate person" and "deliberate indifference" mean in this context. In the two years since the *Davis* opinion, lower courts, including the Eleventh Circuit, have continued to struggle with analyzing a school district's liability under Title IX.

A. Actual Notice to an Appropriate Person

After *Davis*, even a single sexual harassment complaint[13] by a student and/or her mother to the principal should constitute "actual notice" to an "appropriate person" of sexual harassment or a hostile educational environment under Title IX. *Davis*, 526 U.S. at 652-53. The court of appeals in this case, however, concluded that there was no actual notice because it erroneously found that "Burrell complained to Duncan about a slight touching" and "did not suggest that it was inappropriate." Pet. App. 10a-11a. Notwithstanding that a review of Burrell's, and her mother's, testimony reveals that the court of appeals blatantly misconstrued this evidence, the Eleventh Circuit, nevertheless, improperly concluded that Burrell's complaint did not constitute actual notice of sex-based discrimination or a hostile educational environment because Principal Duncan unequivocally admitted that he had the general impression that the accusations being made by Malissia Burrell and her mother, Helen Davis,[14] fell within the area of sexual harassment.[15] Duncan even reported this impression to the school counselor, and to his supervisor, Dr. Daniels, who, according to Duncan, also thought that these complaints were of sexual harassment. (Duncan Depo. at 87.)

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[13] "Within the context of Title IX, a student's claim of hostile environment can arise from a single incident." *Doe v. School Admin. Dist. No. 19*, 66 F. Supp.2d 57, 62 (D.Me. 1999) (citing *Brown v. Hot, Sexy & Safer Productions*, 68 F.3d 525, 541 n.13 (1st Cir. 1995).

Accordingly, Burrell's complaint, in addition to the school's discovery that Mency regularly patted his students on the buttocks, is sufficient evidence from which a jury could conclude that Principal Duncan and school officials were alerted to allegations that Kelvin Mency had engaged in acts of sex-based discrimination and created a hostile environment in the school. These circumstances should be all that is required to constitute "actual notice" to an "appropriate person" under *Gebser* and *Davis*. Thus, the Eleventh Circuit's conclusion that Burrell's sexual harassment complaint to the principal did not constitute actual notice of sex-based discrimination in the school's programs or activities is incorrect as a matter of law and conflicts with this Court's precedent.[16]

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[14] Helen Davis testified that she reported "[t]hat Mency had been fondling with [her] daughter." (Helen Davis Depo. at 6.) The court of appeals statement that "we find no legitimate use of the word 'fondling' after examining Burrell's version of the incident" (Pet. App.10a) usurps the fact-finding role of the jury and is simply incorrect based on Burrell's testimony and Duncan's undisputed admission.

[15] The school policy states that "[i]f there is reasonable cause to believe that a student has been sexually or physically abused, the principal will call the social worker. . . ." Pet. App. 67a. As it is undisputed that Duncan called the school social worker when he received Burrell's complaint, a reasonable jury could conclude that Duncan had reasonable cause to believe that Burrell was sexually abused as defined by O.C.G.A. § 19-7-5.

B. Deliberate Indifference

In describing the proof necessary to satisfy the deliberate indifference standard, this Court has stated that a plaintiff may demonstrate a defendant's deliberate indifference to discrimination "only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 648. In *Davis*, this Court provided some guidance regarding this standard in determining that the failure to discipline the alleged harasser, failure to establish and comply with a sexual harassment policy or procedure, and failure to investigate or put an end to sexual harassment could suggest deliberate indifference on the part of a school. *Id.*

Since *Davis*, the courts which have decided the issue, except for the Eleventh Circuit, have concluded, like *Davis*, that deliberate indifference may be established by demonstrating a school's failure to properly investigate, failure to discipline the harasser, failure to contact police authorities and failure to terminate continued sexual harassment or a hostile educational environment.[17] Despite

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[16] Following *Davis*, one court has already concluded that actual notice of sex-based discrimination in a school's programs or activities may come from a source other than the plaintiff. *See Doe v. School Administrative District No. 19*, 66 F.Supp.2d 57, 63 (D.Me. 1999) (holding that actual notice of sex-based discrimination in a school's programs or activities under Title IX may be established upon allegations made to the principal that a teacher sexually harassed another student, even if school officials do not have specific actual notice of that teacher's sexual abuse of the plaintiff).

[17] *See, e.g.*, *Vance v. Spencer County Public School District*, 231 F.3d 253, 262 (6th Cir. 2000) (concluding that there had been

(Cont'd)

the existence of these same factors, the Eleventh Circuit made a determination that: 1) the failure of the school to reprimand or discipline Mency, 2) the failure to inform law enforcement and an appropriate child welfare agency of Mency's harassment as required by the school's sexual harassment policy and O.C.G.A. § 19-7-5, 3) the failure to comply with the school's sexual harassment policy for documenting and investigating a student's allegations of inappropriate touching and 4) the failure to prevent Mency from being alone with and having continued access to other female students, including the rape and molestation of petitioners, did not constitute deliberate indifference.

The Office of Civil Rights Title IX guidelines state that schools should take immediate and appropriate steps to eliminate a hostile environment if one has been created **and prevent harassment from occurring again**. Dept. of

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(Cont'd)
Title IX sexual harassment because the school failed to discipline the harassing students, failed to inform law enforcement, failed to investigate and failed to end the harassment); *Murrell v. School District No. 1*, 186 F.3d 1238 (10th Cir. 1999) (holding that the school district was deliberately indifferent in a Title IX student-on-student sexual harassment case where the school never informed law enforcement, disciplined the alleged harasser, properly investigated or ended the harassment); *Canty v. Old Rochester Regional School District*, 66 F. Supp.2d 114 (D. Mass. 1999) (determining that in a case of Title IX teacher-on-student sexual harassment that the school district was deliberately indifferent where the principal acknowledged the student's allegations of sexual harassment and issued three letters of reprimand to the harassing teacher but failed to prevent teacher's continued access to and harassment of student); *Doe v. School Administrative District No. 19*, 66 F. Supp.2d 57 (D.Me. 1999) (finding that there was deliberate indifference on the part of the school district in a case of Title IX teacher-on-student sexual harassment where the school failed to investigate allegations of a teacher's reported sexual harassment of at least one student and subsequent failure to prevent harassment of plaintiff).

Education, Office for Civil Rights, Sexual Harassment Policy Guidance: Harassment of Students by School Employees, Other Students or Third Parties, 62 Fed. Reg. 12034, 12042 (1997) (emphasis added). The respondent, however, failed to follow its own school policy for conducting and documenting interviews and failed to take even the most rudimentary steps to prevent Mency from being alone with other female students, including having access to repeatedly rape and molest petitioners on school grounds throughout the school year. A formal file and written statements were never even made.

The court of appeals stated in conclusory fashion, however, that "[t]here is simply no reasonable basis to believe that the failure to obtain written statements or to record the meetings led to a failure to uncover relevant evidence. . . ." Pet. App. 14a. Yvonne Butler and Corrie Wingfield, however, both interviewed Malissia Burrell in November 1993 and claim to have made written notes at this time. Neither Wingfield nor Butler transmitted any written records of interview to Principal Duncan in November 1993. Duncan testified that if he had been given Wingfiled's recorded information in 1993, he would have made further investigation because touching on the "rear end" would be inappropriate. (Duncan Depo. at 237-241.) Consequently, there is *direct* evidence that further inquiry would have been made if Duncan had simply been provided with written statements from the 1993 interviews of Burrell as was required by the DeKalb County policy. Contrary to the finding by the court of appeals, a jury could determine, based on Duncan's own testimony, that the written records made at the time of Burrell's complaint would have confirmed Burrell's allegations that sexual abuse, as defined by O.C.G.A. § 19-7-5, had occurred and that Duncan would have investigated Mency's conduct.

The court of appeals also has attempted to excuse respondent's failure to prevent petitioners' abuse by pointing to the testimony of Duncan's supervisor, Dr. Roosevelt Daniels, who claims that "nothing about sexual misconduct whatsoever" was communicated to him with regard to Burrell's complaint. Pet. App. 10a. The Eleventh Circuit refused to acknowledge, however, that Duncan testified to the contrary:

> Q. So, now, at the time you received the complaint, you had a general impression . . . that it would fall within an area of sexual harassment . . . ; true?
>
> A. True.
>
> Q. And I assume you would have related that to Mr. Daniels or he related it to you; is that true?
>
> A. Yes, sir.
>
> Q. And would you agree, based on your perceptions of your conversation, that is the words he used and the opinions you formed, that he was generally sharing the same opinion that it fell within the area of sexual harassment, . . . ; right?
>
> A. Yes, sir.
>
> Q. And then so what did he tell you to — what did he tell you to do?
>
> A. He said to investigate it, which I told him we were doing, that I was to contact the social worker because there may be a need to contact Department of Family and Children Services as well. . . .

(Duncan Depo. at 87-88.) Thus, Duncan's testimony demonstrates that he perceived that Burrell's complaints fell within the ambit of sexual harassment and that he reported this information to Dr. Daniels. If, as Dr. Daniel's testified, Duncan failed to communicate to Daniels that Malissia Burrell's complaints were in the nature of sexual harassment as required by DeKalb County policy, this failure to report, in conjunction with Duncan's unequivocal admission that he chose *not* to refer to the school sexual harassment policy with which he was unfamiliar, is sufficient evidence from which a jury could determine that the school made an affirmative decision not to remedy Mency's continued sexual harassment of female students in the school and was deliberately indifferent.

At a minimum, the multiple violations of school policy and state law by school officials, including, but not limited to, 1) interrogating the victim in the presence of the perpetrator, 2) the failure of the principal to obtain written statements from the complainant and alleged harasser, 3) the failure to inform a child welfare agency and police authorities, 4) the failure to conduct the school-level investigation with police authorities and 5) the failure to prevent Mency's continued access to other female students evidence deliberate indifference to actual notice of sex-based discrimination. The determination by the Eleventh Circuit that the violation of school policy is not evidence of deliberate indifference usurps the fact-finding function of the jury and renders any school policy on investigating student's claims of sexual harassment meaningless. This Court's refusal to grant this petition will have the effect of condoning a school district's flagrant and intentional violation of its own policies in responding to allegations of teacher-on-student sexual harassment in order to insulate itself from institutional liability under Title IX. Surely, this was not the intention of this Court when it unanimously concluded that Title IX authorized a high school student who had been sexually harassed by her teacher to recover damages from the school district, *Franklin v. Gwinnett County Public County Schools*, 503 U.S. 60 (1992), and when it concluded that Title IX should be accorded "a sweep as broad as its language," *North Haven Board of Education v. Bell*, 456 U.S. at 521 (1982).

Title IX requires that more than mere lip service be paid to a child's complaint that her teacher fondled her and to a sexual harassment policy that sets forth explicit procedures designed to protect the child and others from continued sexual abuse by the teacher. In order to fully effectuate the broad anti-sex-discrimination provisions of Title IX, this Court should grant this petition to confirm that there is actual notice of sex-based discrimination in a school's programs or activities when complaints are made to a principal that a teacher in the school has sexually harassed a student. Further, this Court should grant this petition to settle the law with respect to the deliberate indifference standard under Title IX by delineating that deliberate indifference may be established by demonstrating that a school failed to comply with its own sexual harassment policy and state law for investigating complaints of teacher-on-student sexual harassment.

Without clear pathmarkers to afford guidance to lower courts and school officials responsible for the implementation of Title IX, cases like the instant one will continue to arise. Sadly, without a further delineation of what constitutes actual notice and deliberate indifference in the circumstance where school officials are cognizant of a complaint of sexual harassment but fail to follow school policy and state law in responding, the number of cases involving sexual harassment of students in schools by teachers will continue to be an all-too-common aspect of the educational experience.

CONCLUSION

For these reasons, this Court should grant the instant petition as much to delineate clearer guide posts of a school's institutional liability for teacher sexual harassment under Title IX as to promote a rule of law that will have the effect of diminishing rather than increasing the number of cases of teacher-on-student sexual abuse in this country.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED NOVEMBER 24, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-14455
D.C. Docket No. 96-02845-CV-TWT-1

EDITH DAVIS, as Legal Guardian on behalf of
Jane Doe, individually,

Plaintiff-Appellant,

versus

DEKALB COUNTY SCHOOL DISTRICT, a Local Education Agency (LEA), WILLIAM L. DUNCAN, JR., in his Individual and Official Capacity as Principal of Knollwood Elementary School, et al.,

Defendants-Appellees.

No. 99-14456
D.C. Docket No. 97-00382-CV-TWT-1

VICKI LINDSAY, individually and as Legal Guardian
on behalf of Jane Doe, Individually,

Plaintiff-Appellant,

versus

DEKALB COUNTY SCHOOL DISTRICT, a Local Education Agency (LEA), WILLIAM L. DUNCAN, JR., in his Individual and Official Capacity as Principal of Knollwood Elementary School, et al.,

Defendants-Appellees.

No. 99-14458
D.C. Docket No. 97-00491-CV-TWT-1

DIANNA COLTON, Individually and as Legal Guardian on behalf of Jane Doe, Individually,

Plaintiff-Appellant,

versus

DEKALB COUNTY SCHOOL DISTRICT, a Local Education Agency (LEA), WILLIAM L. DUNCAN, JR., in his Individual and Official Capacity as Principal of Knollwood Elementary School, et al.,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Georgia

(November 24, 2000)

Before COX, BLACK and FAY, Circuit Judges.

PER CURIAM:

This is a sexual harassment/discrimination suit arising out of the acts of a physical education teacher, Defendant Kelvin Mency ("Mency"), at Knollwood Elementary School. Plaintiffs,[1] appellants here, filed complaints against the DeKalb County School District ("DCSD"), William L. Duncan, Jr., principal of Knollwood Elementary ("Duncan"), and Mency under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 ("Title IX"), Title 42 U.S.C. § 1983 ("section 1983"), and Georgia tort law. After consolidating the cases, the district court granted summary judgment in favor of DCSD and Duncan. On appeal, Plaintiffs contend that the district court erred in applying the incorrect legal standard for institutional liability under Title IX, and in concluding that Plaintiffs failed to create a jury question on their section 1983 claim. We do not decide whether the district court applied the incorrect standard because we conclude, under *Gebser*[2] and section 1983 jurisprudence, that Plaintiffs have failed to produce any evidence that Defendants knew of or acted with deliberate indifference to Mency's misconduct. Accordingly, we affirm the district court's judgment with respect to both claims.

I. Factual and Procedural History

Kelvin Mency, a seventh-grade physical education teacher and faculty advisor of the Safety Patrol at Knollwood

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[1] Plaintiffs brought suit individually and as legal guardians of three students Mency molested.

[2] *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 118 S.Ct. 1989 (1998).

Elementary School, sexually molested Plaintiffs during the 1993-1994 school year.[3] There is no evidence that anyone witnessed any of these events. Moreover, the Plaintiffs never told their parents, legal guardians, or anyone at school what was happening while the events were occurring. In the fall of 1994, one of the Plaintiffs confided in a friend that Mency was touching her inappropriately. The friend told a police officer who lectured at the school, and the police began an investigation into Mency's contact with students. As a result, Mency resigned from his post. Mency was subsequently convicted on six counts of child molestation and one count of criminal attempt to commit child molestation, and is currently serving a 20-year sentence.

After Mency's criminal conviction, Plaintiffs brought this action against the DCSD, Duncan, and Mency.[4] The complaints alleged violations of Title IX, Section 1983, and Georgia tort law. The district court consolidated the cases by consent order, and granted summary judgment in favor of DCSD on Plaintiffs' Title IX claim. The district court concluded that Plaintiffs had failed to produce any evidence that the school board or school superintendent had actual notice of the sexual harassment. The district court went on to find that Plaintiffs also failed to produce evidence that any official with supervisory authority knew or should have known that Mency was molesting Plaintiffs. In addition, the district court granted summary judgment in favor of Duncan and DCSD on Plaintiffs' Section 1983 claim concluding that Plaintiffs could not show that Defendants either knew that Mency was harassing Plaintiffs or that Defendants acted with reckless disregard to the possibility that he would do so.

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[3] The district court found undisputed evidence that Mency would tell the Plaintiffs, individually and on different occasions, to meet him in empty classrooms, the physical education equipment room, the teacher's bathroom, or other places where no one could observe what Mency was doing. The district court further found that Mency engaged in such acts as kissing the Plaintiffs, exposing himself, fondling the Plaintiffs and masturbating in front of them. The evidence also showed that Mency sodomized one of the Plaintiffs.

[4] Plaintiffs sued Duncan in his individual and official capacity as Principal of Knollwood Elementary School, and Mency in his individual and official capacity as former teacher at Knollwood. On appeal, Plaintiffs do not argue that the district court erred in dismissing the claim against Duncan in his individual capacity.

Plaintiffs' action against Mency proceeded to trial, and a jury found Mency civilly liable to the Plaintiffs for the amount of $500,000 in compensatory damages and $100,000 in punitive damages. The district court entered final judgment in favor of the Plaintiffs and against Mency in accordance with the verdict. Subsequently, Plaintiffs filed this appeal requesting reversal of the District Court's orders granting summary judgment to DCSD and Duncan.

II. Discussion

On appeal, Plaintiffs argue that the district court applied the wrong legal standard for the institutional liability of a school district under Title IX. Plaintiffs contend that the evidence, viewed in light of the proper standard, establishes that the principal and other school officials were aware of facts sufficient to alert them to Mency's misconduct and that the school's response was clearly unreasonable in light of the known circumstances. On their section 1983 claim, Plaintiffs contend that they produced sufficient evidence for a jury to find that DCSD and Duncan knew that Mency was a danger to the Plaintiffs or that DCSD and Duncan were deliberately indifferent to facts that put them on notice of the danger. We disagree.

We review the grant of summary judgment de novo. *See Gordan v. Cochran*, 116 F.3d 1438, 1439 (11th Cir. 1997). We, like the district court, are required to view the facts in the light most favorable to the non-movant. *See Walls v. Button Gwinnett Bancorp, Inc.*, 1 F.3d 1198, 1200 (11th Cir. 1993).

A. Title IX

Title IX provides, in pertinent part, that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." 20 U.S.C. § 1681(a). The Supreme Court has recognized an implied private cause of action for money damages in Title IX cases of intentional sexual discrimination. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75, 112 S.Ct. 1028, 1038 (1992). Moreover, the Court has held that sexual harassment of a student by a teacher constitutes actionable discrimination for the purposes of Title IX. *Id.*

After the district court granted summary judgment in the instant case, the Supreme Court clarified the standard under which a school district may be held liable under Title

IX for a teacher's sexual harassment of a student. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 118 S.Ct. 1989 (1998). The Court held that:

> . . . a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's program and fails adequately to respond.

Id. at 290, 1999. Moreover, the Court decided that "the response must amount to deliberate indifference to discrimination" for liability to attach. *Id.* The Court concluded that the Lago Vista school district could not be held liable where the only official alleged to have knowledge was the high school principal, and the information consisted of a complaint from parents of other students that the teacher had made inappropriate comments during class. *Id.* at 291, 2000. This information, the Court reasoned, was "plainly insufficient to alert the principal to the possibility that [the teacher] was involved in a sexual relationship with a student." *Id.*

Following the Supreme Court's decision in *Gebser*, the Eleventh Circuit determined that a Title IX plaintiff must establish two things to survive summary judgment in a cause of action against a school district for the discriminatory acts of its employees: "First, some supervisor with authority to take corrective action was placed on notice of the bad conduct. Second, the supervisor possessing this authority was a school official high enough up the chain-of-command that his acts constitute an official decision by the school district itself not to remedy the misconduct." *Floyd v. Waiters*, 171 F.3d 1264 (11th Cir.), *cert. denied*, 120 S.Ct. 215 (1999).

1. Supervisor With Authority to Remedy the Misconduct

The district court held that Plaintiffs could not recover under Title IX, as a matter of law, because the evidence failed to show that the school board or school superintendent had actual notice of the sexual harassment.[5] Alternatively, the district court found no evidence that any school official with supervisory authority had notice that Mency was molesting the three students.[6] We find that it is unnecessary to decide whether Duncan, as principal of Knollwood Elementary, was a supervisory official with authority to take corrective action on behalf of the school district. Assuming, arguendo, that a principal could be such, we find no evidence to support the claim that Duncan acted with deliberate indifference to notice of Mency's misconduct.

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[5] The district court granted summary judgment in the instant case prior to the Supreme Court's decision in *Gebser*. While *Gebser* precludes a damages recovery based upon the imputation of knowledge to a school district, the Supreme Court did not hold that liability must be predicated upon actual notice to the school board or superintendent. Rather, liability could attach upon notice to an "appropriate person." *Gebser*, 524 U.S. at 285-290, 118 S.Ct. at 1997-1999.

[6] We need not decide whether the district court's alternative analysis conforms to the rule embraced in *Gebser*, and leave for another day the task of delineating *Gebser's* "appropriate person."

2. Actual Notice

A school district must have actual notice before it can be held liable in damages for intentional discrimination based on sex. *See Gebser*, 524 U.S. 274, 287-289, 118 S.Ct. 1989, 1998-1999 (reasoning that recovery based on principles of vicarious liability or constructive notice is at odds with express enforcement scheme requiring notice to an "appropriate person," and would "divert [ ] education funding from beneficial uses where a recipient was unaware of discrimination in its programs and is willing to institute prompt corrective measures").[7] Defendant DCSD contends that the school district did not have "actual notice" that Mency was sexually abusing students until September 1994. Plaintiffs argue that the school district had actual notice of Mency's misconduct as early as November 1993. Plaintiffs do not contest the district court's finding that Plaintiffs did not tell their parents, any teacher, or any other school district employee about Mency's conduct when it was occurring. Instead, Plaintiffs contend that DCSD knew or should have known that Mency was sexually abusing Plaintiffs because of a complaint lodged by a student who is not a party to this case.

In November 1993, another Knollwood student, Malissia Dan'Yell Burrell, was playing touch football during an after-school physical education class taught by Mency. In her deposition,[8] Burrell stated that she was playing center, and Mency quarterback. On one play, Burrell felt Mency "touch [her] behind" as she hiked the ball. Later, after the class had ended, Burrell was getting a drink from the water fountain when Mency "tried to touch" her inappropriately. The following day, Burrell and her guardian, Helen Davis, came to school to discuss Defendant Mency's actions with Duncan.[9] Burrell told Duncan that Mency had asked her to "come closer" toward Mency when hiking the football, and that, on the next play, Mency had touched her behind as she hiked the ball to him. She also told Duncan that Mency had tried to touch her at the water fountain after the game, but she moved out of the way. According to Burrell, Mency did not try to put his hand down her pants, and he did not actually make contact with her at the water fountain.

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[7] It is important to note that the Title IX standard does not affect an individual's right to recover against a school district as a matter of state law, or against the teacher in his individual capacity under state law. *See Gebser*, 524 U.S. at 292, 118 S.Ct. at 2000. In fact, Plaintiffs in the instant action succeeded in their action against Mency entitling them to $600,000 in damages.

As in *Gebser*, we cannot say that Burrell's complaint was sufficient to alert DCSD to the possibility that Mency was sexually harassing Plaintiffs.[10] Burrell complained to

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[8] Due to a discrepancy between the parties as to the exact nature of Burrell's complaint, we have gone back to Burrell's deposition testimony in the record to determine precisely what Burrell told Duncan and other school personnel.

[9] Davis reportedly told Duncan that "Mency [had] been fondling with [her] daughter." However, even viewed in the light most favorable to the Plaintiffs, we find no legitimate basis for Davis' use of the word "fondling" after examining Burrell's version of the incident.

[10] Dr. Roosevelt Daniels, Duncan's supervisor, testified in his deposition that "nothing about sexual misconduct whatsoever" was ever communicated to him with regard to Burrell's complaint.

Duncan about a slight touching during a touch football game in which she was playing center and Mency was playing quarterback. Afterwards, at the water fountain, Burrell thought that Mency was about to touch her, but she moved away. Although we can understand a parent's misgivings about a Coach playing quarterback with a female student playing center, Burrell did not suggest that it was inappropriate. We agree with the district court that a complaint of an incidental touching during an athletic event and a perceived imminent touching could not, as a matter of law, apprise Defendants to the possibility that Mency was sexually molesting Plaintiffs. Furthermore, even if such a complaint were sufficient to constitute actual notice, Defendants responded with anything but deliberate indifference.

3. Deliberate Indifference

After meeting with Burrell and Davis, Duncan contacted his supervisor, Area Director Dr. Roosevelt Daniels. On Daniel's instruction, Duncan directed the school counselor, Yvonne Butler, and the school social worker, Corrie Wingfield, to investigate Burrell's complaint. Butler and Wingfield interviewed Burrell and Pope, a student Burrell identified as having witnessed Mency touch Burrell. However, when Butler interviewed Pope, Pope denied seeing Mency touch Burrell. Pope did confirm that Mency slapped boys and girls at the after-school P.E. class as praise for making good plays. Based on her interviews, Butler concluded that Mency inadvertently touched Burrell during touch football and that Burrell perceived that Mency tried to touch her after the game at the water fountain.

Wingfield also interviewed Burrell and Pope individually. Unlike Butler, Wingfield did not know why she had been asked to interview the students. Neither student made any allegation of sexual or physical abuse, and Wingfield did not perceive that she was even investigating a complaint of sexual misconduct.

Duncan met with Mency to discuss the gravity of the situation. Mency denied doing anything inappropriate, and stated that if he was patting the students on the back, of which he couldn't be sure, it was in the context of athletics. Duncan told Mency he disapproved of Mency's conduct and directed him to stop patting boys or girls on the back side.

At the conclusion of the investigation, Duncan arranged a meeting with Davis, Burrell, Butler, and Mency. Burrell recounted her allegations, but Mency denied any intent or attempt to touch Burrell. Duncan invited questions from Davis, but she didn't have any. After discussion, Duncan concluded that Mency might have touched Burrell inadvertently during the football game. However, Burrell could not state that it was sexual in nature. Moreover, both Burrell and Mency were in accord that no touching took place at the water fountain.

Even though the investigation failed to reveal reasonable evidence of inappropriate conduct by Mency, Duncan took immediate corrective action. With Davis' approval, Duncan removed Burrell from the after-school P.E. class with Mency. Duncan offered to remove Burrell from her regular P.E. class with Mency, but Burrell wanted to stay in the class. Burrell's mother similarly rejected Duncan's offer to transfer Burrell to another school. Duncan instructed Mency to avoid all contact with Burrell other than class. Duncan also forbade Mency from being alone with Burrell or any female student. Finally, Duncan informed Davis that she should contact Duncan's supervisor if Davis thought anything further should be done.

Duncan followed up with Burrell several times throughout the school year, but Burrell had no further complaints. Duncan also monitored Mency for any indiscretions, but he never observed Mency alone with female students. At least three other teachers also testified that they never saw Mency alone with female students, and they never witnessed him behave inappropriately around students.[11]

Plaintiffs contend that Duncan acted with deliberate indifference because Duncan did nothing to protect Plaintiffs in the face of actual knowledge that Mency engaged in acts of discrimination. Plaintiffs complain that Duncan neglected to interview any teachers or students about Mency's conduct. Plaintiffs also protest Duncan's failure to direct anyone to monitor Mency. Plaintiffs make the related argument that Duncan disregarded DeKalb County Schools policy[12] in the investigation of Burrell's complaint. In support of this argument, Plaintiffs point out that Duncan neglected to take a written statement from Burrell or Mency, that he failed to open a file on the complaint, and that he failed to conduct the school level investigation in cooperation with the school detective, as outlined in school policy. Although Duncan followed school policy in alerting the school counselor and social worker to the allegations, Plaintiffs complain that Duncan failed to provide a written summary of the interviews to Daniels, as required. In short, Plaintiffs maintain that if Duncan or Daniels had followed school district policy, the school would have eradicated Mency's abuse of Plaintiffs.

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[11] The parties deposed these teachers during discovery of the present action.

[12] Specifically, Plaintiffs rely on "Investigation Guidelines" set forth in *Dealing With Allegations by Students or Parents of Misconduct by Staff Members* (approved Aug. 10, 1994). Although we address Plaintiffs' contentions, we question whether these guidelines were in effect when Burrell lodged her complaint in November of 1993.

We cannot find merit in Plaintiffs' speculation. There is simply no reasonable basis to believe that the failure to obtain written statements or to record the meetings led to a failure to uncover relevant evidence or caused the investigation to be any less thorough. We are similarly unpersuaded that Burrell or Mency would have responded differently to questioning had they been asked to provide a written statement. We reiterate that there is simply no evidence that DCSD had "actual notice" of Mency's misconduct until one of the Plaintiffs was confronted by the school detective in September 1994. It is undisputed that Mency's sexual abuse of the Plaintiffs occurred in secret, where no one could observe what he was doing. We also disagree with Plaintiffs' characterization of Duncan's response to Burrell's complaint. Even if Duncan, in response to Burrell's complaint, had interviewed teachers and asked them to monitor Mency, there is no evidence they would have observed Mency involved in inappropriate behavior. In fact, teachers deposed during the instant litigation did not observe Mency engage in any inappropriate conduct around his students during the 1993-94 school year. Furthermore, they testified that they would have reported it if they had.

Even drawing all reasonable inferences in favor of Plaintiffs,[13] we must agree with the district court that Plaintiffs have failed to create a genuine issue of material fact that Duncan acted with deliberate indifference. Duncan contacted his supervisor, and directed the school counselor and school social worker to interview Burrell and Pope, the witness identified by Burrell. Duncan interviewed Mency. Duncan then met with Davis, Burrell, Mency and Butler.[14] Although he concluded that nothing of a sexual or inappropriate nature had taken place, Duncan instituted corrective measures. He removed Burrell from after-school P.E., and offered to remove her from regular P.E. Duncan ordered Mency to stay away from Burrell and not to be alone with female students. Duncan called Daniels who suggested offering Burrell an administrative transfer. Duncan followed up with Burrell several times over the course of the school year, and monitored Mency closely. Although ultimately ineffective in preventing Mency from discriminating against Plaintiffs, the relevant question is whether Duncan's actions amounted to deliberate indifference. *Cf. Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 456 n. 12 (5th Cir.) (en banc) (applying deliberate indifference standard for purposes of § 1983 analysis and recognizing that many good faith but ineffective responses may satisfy a school official's obligations), *cert. denied sub nom. Lankford v. Doe*, 513 U.S. 815, 115 S.Ct. 70 (1994). We hold, as a matter of law, that they did not. *See Gebser*, 524 U.S. at 291 (equating deliberate indifference to "an official decision not to remedy the violation"). Thus, the district court correctly granted summary judgment in favor of DCSD on Plaintiffs' Title IX claim.

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[13] We would be remiss to overlook the district court's error in commenting on one of the Plaintiff's sexual history. Pursuant to Fed.R.Evid., Rule 412(b)(2), evidence offered to prove the sexual behavior or sexual predisposition of an alleged victim is admissible if otherwise admissible and its probative value *substantially outweighs* the danger of unfair prejudice to any party. We believe the prejudice to Plaintiffs substantially outweighed any probative value this evidence could possibly have had, and thus, should not have been considered by the court on a motion for summary judgment. The district court's error in addressing this evidence is even more serious in this case because Plaintiff was a minor. Thus, Plaintiff could not consent to Mency's sexual abuse because she did not possess the legal capacity to consent. Nevertheless, we do not find that this error requires reversal because no reasonable juror could find that DCSD, through Duncan, acted with deliberate indifference to Burrell's complaint.

[14] Although one could argue that this approach was not wise, that is not the question before us.

B. Section 1983

Plaintiffs claim that the district court erred by granting summary judgment and finding DCSD and Duncan not liable under section 1983 for Mency's misconduct. A plaintiff seeking to impose liability on a municipality (school district) under section 1983 must identify a municipal "policy" or "custom" that caused a deprivation of federal rights. *Board of County Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 403, 117 S.Ct. 1382, 1388 (1997).[15] But it is well established that a municipality may not be held liable under section 1983 on a theory of respondeat superior. *See Monell v. Dept. of Social Servs.*, 436 U.S. 658, 98 S.Ct. 2018 (1978). Instead, "recovery from a municipality is limited to acts that are, properly speaking, acts 'of the municipality' — that is, acts which the municipality has officially sanctioned or ordered." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478, 106 S.Ct. 1292, 1298 (1986). Moreover, it is not enough to identify conduct properly attributable to the municipality. A plaintiff must show that the municipal action was taken with the requisite degree of culpability, i.e., that the municipal action was taken with " 'deliberate indifference' " to its known or obvious consequences. *Brown*, 520 U.S. at 407, 117 S.Ct. at 1390 (*quoting City of Canton v. Harris*, 489 U.S. 378, 388, 109 S.Ct. 1197, 1204 (1989)).

In essence, Plaintiffs claim that the Defendants failed to protect Plaintiffs from Mency.[16] In granting summary judgment, the district court concluded that the Plaintiffs had failed to produce sufficient evidence to satisfy the requirement that DCSD or Duncan knew of Mency's conduct or were deliberately indifferent to evidence that should have put them on notice. Thus, the only issue before us is whether Plaintiffs created a triable issue that Defendants possessed the requisite notice to establish institutional liability under section 1983.

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[15] Locating a policy ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to represent official policy. Similarly, an act performed pursuant to a custom that has not been formally approved by an appropriate decision-maker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law. *Brown*, 520 U.S. at 403-4.

[16] Plaintiffs asserted three theories of recovery: (1) violation of DCSD policy; (2) failure to investigate, train and report; and (3) a custom of inaction.

The district court correctly held that the deliberate indifference standard applies to section 1983 claims basing liability on a municipality's actions in failing to prevent a deprivation of federal rights. *See Gebser*, 524 U.S. at 291, 118 S.Ct. at 1999 (*citing Brown*, 520 U.S. 397, 117 S.Ct. 1382 (1997)). As stated at length in our discussion of Plaintiffs' Title IX claim, the record contains no evidence that the Defendants knew that Mency was sexually harassing Plaintiffs, or that Defendants were deliberately indifferent to information that should have put them on notice.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's judgment.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION IN *DAVIS, et al. v. DEKALB COUNTY SCHOOL DISTRICT, et al.*, CIVIL ACTION NO. 1:96-CV-2845-TWT DATED AND FILED MARCH 12, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. 1:96-CV-2845-TWT

EDITH DAVIS, as legal guardian on behalf of
JANE DOE, individually,

Plaintiffs,

v.

DEKALB COUNTY SCHOOL DISTRICT, a Local Education Agency (LEA), WILLIAM L. DUNCAN, JR., in his Individual and Official Capacity as Principal of Knollwood Elementary School, KEVIN MENCY, in his Individual Capacity as former Teacher at Knollwood Elementary School,

Defendants.

ORDER

This case is before the Court on Plaintiffs' Motion to Compel [36-1] and for Sanctions [36-2], Motion for Leave to Respond to Affidavit of Arnold Butler [48-1], Defendant DeKalb County School District's Motion for Summary

Judgment [53-1], Defendant Duncan's Motion for Summary Judgment [55-1], Defendants' Motion to Appoint Guardian Ad Litem [57-1], Defendants' Motion to Clarify Order [58-1], Defendants' Motion for Leave to Supplement Motion for Summary Judgment [60-1], Defendants' Motion to Amend and Substitute Brief [75-1], Plaintiffs' Motion to File a Supplemental Memorandum [76-1], and Defendants' Motion for Reconsideration [84-1]. For the reasons stated at this Court's December 12, 1997, hearing, the Defendants' Motion to Appoint Guardian Ad Litem and Motion to Clarify Order are both denied. In the interests of justice the Court grants Defendants' Motion for Leave to Supplement Motion for Summary Judgment, Defendants' Motion to Amend and Substitute Brief, and Plaintiffs' Motion to File a Supplemental Memorandum. Because this Court has previously denied the Plaintiffs' Motion for Inquiry and Sanctions, upon which Plaintiffs' Motion to Compel is based, the Court denies Plaintiff's Motion to Compel. Finally, finding no error, the Court denies the Plaintiff's Motion for Reconsideration.

I. Facts

This case arises out of the acts of a physical education teacher, Defendant Kelvin Mency, at Knollwood Elementary School. The school is part of the DeKalb County School District. During the 1993-94 school year, Defendant Mency sexually molested at least three female students. Defendant William L. Duncan, Jr. was the principal at Knollwood Elementary when the sexual molestation took place. This action is brought on behalf of one of the three female students by her legal guardian. She is named in the Complaint as Jane Doe. She will be referred to herein as the Plaintiff.

Appendix B

During the 1993-1994 school year, the Plaintiff was a thirteen-year-old seventh grade student at Knollwood Elementary School. When she was nine, a male cousin touched her inappropriately. At age 12 she had sexual intercourse with the who lived boy next door. When she told her mother about that incident her mother punished her by whipping her with a belt. The Plaintiff also has herpes, but she does not know where she contracted the disease. Defendant Mency was Plaintiff's seventh grade physical education teacher and was the faculty advisor of the Safety Patrol, of which she was a member. During the 1993-1994 school year, Defendant Mency asked the Plaintiff to go to the teacher's bathroom. She went there and waited for him until he came. They kissed and then engaged in an act of sodomy. This happened again a second time in the physical education equipment room. On another occasion, she performed oral sex on Mency in an empty classroom. On another occasion, she met him in an equipment storage shed where he kissed her. On each occasion, Defendant Mency would tell her where to meet him and she would go and wait until he arrived. On each occasion, she had a pretty good idea of what was going to happen. Defendant Mency also kissed Plaintiff on two other occasions; once outside the cafeteria and once in front of the library. No one was around when this occurred. There is no evidence in the record that anyone witnessed any of the acts of sexual molestation or other improper behavior that occurred between Mency and Plaintiff.

The Plaintiff never told her mother, or anyone at the school, about what was happening between her and Defendant Mency. Mency told her that he would lose his job if the school found out what was happening. After the Plaintiff graduated from Knollwood Elementary School in May or June of 1994 she started Columbia High School in September. The police began investigating Defendant Mency when another student at Knollwood confided in a friend that Defendant Mency was touching her inappropriately. The friend told a police officer who regularly lectured at the school. This resulted in an investigation by the police. As part of that investigation a detective came to Columbia High School and questioned Plaintiff about her involvement with Defendant Mency. The first time that she was questioned, she denied having sex with him. She thought that what happened between them was not anyone else's business. She was questioned a second time by a different detective. She admitted to what happened after the second detective told her that Mency had admitted having sex with her. Defendant Mency was subsequently convicted of child molestation and sentenced to 20 years in prison.

The three students Mr. Mency molested have filed separate actions against Mency, Duncan, and the DeKalb County School District [hereinafter "the School District"] alleging violations of 20 U.S.C. § 1681 [commonly known as Title IX], 42 U.S.C.A. § 1983 [commonly known as Section 1983], and various state laws. Defendant Duncan and the School District have moved for summary judgment on all counts.

II. Discussion

Summary judgment is appropriate only when the pleadings, depositions, and affidavits submitted by the parties show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The court should view the evidence and any inferences that may be drawn in the light most favorable to the non movant. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 158-159, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970). The party seeking summary judgment must first identify grounds that show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). The burden then shifts to the non-movant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact exists. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986).

A. The Plaintiffs' Title IX Claim

The Plaintiffs assert that the School District violated Title IX by failing to prevent Defendant Mency from molesting Plaintiff. Title IX provides that "no person in the United States shall, on the basis of sex, . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ." 20 U.S.C. § 1681(a). In *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992), the Supreme Court recognized an implied private cause of action for money damages in Title IX cases of intentional sexual discrimination. The Court held that sexual harassment is one form of sexual discrimination. *Id.*

There is disagreement about the standard that applies to institutional liability for sexual harassment under Title IX.

Some courts have held that an educational institution is liable when a teacher intentionally harasses a student because of sex regardless of whether the school or school district has knowledge of the harassment. *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 901 (1st Cir. 1988); *Does 1,2,3,4 v. Covington County School Bd.*, 969 F. Supp. 1264, 1277 (M.D. Ala. 1997); *Kadiki v. Virginia Commonwealth University*, 892 F. Supp. 746, 751 (E.D. Va. 1995). This approach is based at least in part on the Supreme Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), where the Supreme Court concluded that agency rules, specifically *respondeat superior*, could support institutional liability under Title VII. Other courts have rejected the general application of *respondeat superior* to Title IX cases. *Doe v. Lago Vista Independent School Dist.*, 106 F.3d 1223 (5th Cir. 1997), *cert granted in Jean Doe, Jane Doe, a Minor v. Lago Vista Independent School District*, __ U.S. __, 118 S.Ct. 595, 1997 WL 291406 (U.S. Dec. 05, 1997) (rejecting agency liability for sexual harassment cases under Title IX); *Smith v. Metropolitan School Dist. Perry Tp.*, 128 F.3d 1014 (7th Cir. 1997) (rejecting agency liability under Title IX because of lack of agency language and because Spending Clause requires intent for Title IX claims). Other courts, while not rejecting outright application of agency principles, have limited their application in Title IX cases. *Lipsett*, 864 F.2d at 897 (limiting its application of Title VII precedent to Title IX cases for employment discrimination).

A recent decision, cited by counsel at oral argument, suggested that the Eleventh Circuit would join the ranks of courts that refuse to apply agency principles in Title IX cases.

Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir. 1997) (pet. for cert. filed, 66 U.S.L.W. 3387 (Nov. 19, 1997)). An even more recent Eleventh Circuit decision, handed down after oral argument, unequivocally states that this is true. In *Floyd v. Waiters*, No. 94-8667, __ F.3d __, 1998 WL 17093 (11th Cir. Jan. 20, 1998), the Eleventh Circuit explicitly rejected agency liability as a basis for Title IX claims. In so doing, the *Floyd* Court not only rejected the imputation of liability from a harassing teacher to his or her supervisor, but also rejected the imputation of liability from a supervisor to the school board or superintendent. *Id.* at *1-4. Therefore, the current rule in the Eleventh Circuit is that there must be actual notice of the sexual harassment to the school board or to the school superintendent in order for there to be a claim against the school system under Title IX.[1] Because there is a total absence of such evidence in this case, the Plaintiffs cannot recover under Title IX.

Even under a less demanding standard, the Defendants (other than Mency) would be entitled to summary judgment. As discussed below, there is simply no evidence that any school official with supervisory authority knew of or should have known that Mency was molesting the three students.

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[1] On March 13, 1997, the Department of Education's Office of Civil Rights issued a document called "Sexual Harassment Guidance." The Guidance states that, for Title IX purposes, a school will have actual notice of sexual harassment whenever an agent or responsible employee has notice. The Eleventh Circuit did note that this Guidance might change the application of agency principals in Title IX cases that arise after March 13, 1997. *Floyd*, at *2 n.7. This case arose before March 13, 1997, and therefore the standard set forth in *Floyd* is binding precedent as to this case.

There is no evidence that the school system was deliberately indifferent to knowledge or information that would have put it on notice that Defendant Mency was molesting the three students. It is clear from *Davis* that the school system must be on notice before it can be held liable for intentional discrimination based on sex. In this case, no one knew about the sexual molestation of the three students except Defendant Mency and his victims. Therefore, there can be no basis for Title IX liability against the school system.

B. The Plaintiffs' Section 1983 Claims

The Plaintiffs claim that by not preventing Mency from molesting Plaintiff the School District and Mr. Duncan violated Section 1983. Respondeat superior is not available as a theory of liability in a Section 1983 action. *Monnell v. Dept. of Social Services*, 436 U.S. 658, 691-92 (1978). In order for liability to attach, the Defendants must have either known or should have known that Mr. Mency posed a danger to Plaintiff. *See e.g.*, *Floyd*, at *7 ("a 'custom' requires that policymaking officials knew about the widespread practice but failed to stop it."); *Lancaster v. Monroe County, Ala.*, 116 F.3d 1419, 1424 (11th Cir. 1997) (requiring knowledge of danger to safety or health for violation of Section 1983); *Cottrell v. Caldwell*, 85 F.3d 1480, 1491 (11th Cir. 1996) (same). Therefore, to prevail on their claims against the School District or Defendant Duncan under Section 1983 the Plaintiffs must show that these Defendants either knew that Defendant Mency was a danger to the students or were deliberately indifferent to that danger after being put on notice of the danger.

The evidence does not show that Defendant Mency's actions toward Plaintiff were such that the Defendants knew that he was a danger to her. None of the students, including Plaintiff in this case, reported that Mency was molesting them. The testimony shows that most of the inappropriate contact between Mency and the students took place in secret, where no one could have observed what Mency was doing. Furthermore, to the extent that it occurred where anyone could have seen it, there is no evidence that anyone actually did see Mency molest any of the students or that they reported what they saw if they did. There is no evidence that the Defendants knew that Mency was molesting these students.

Nor was there a reason for these Defendants to believe that Defendant Mency was a substantial threat to students. The Plaintiffs argue that the Defendants knew that Mr. Mency was a danger because of a complaint filed by a student who is not a party to this case. In November of 1993, another Knollwood student, Ms. Malissa Dan'Yell Burrell, was playing center in a touch football game. Defendant Mency was playing quarterback. At some point, Defendant Mency touched Ms. Burrell on her behind. Ms. Burrell also believed that, following the football game, Defendant Mency attempted to touch her inappropriately when she was near the water fountain, but she moved away before he could. The following day, Ms. Burrell and her guardian, Helen Davis, came to school to discuss Defendant Mency's actions with Defendant Duncan.

Defendant Duncan directed Yvonne Butler, the school counselor, and Corrie Wingfield, the school social worker, to investigate Ms. Burrell's allegations. During their investigation Ms. Wingfield and Ms. Butler met with Ms. Burrell and another student regarding the complaint. Mency denied doing anything inappropriate. Upon conclusion of their investigation, Ms. Wingfield and Ms. Wingfield concluded that the Burrell incident was not sexual in nature. In a subsequent-meeting, Defendant Duncan met with Ms. Davis, Ms. Burrell, and Defendant Mency to discuss the situation. Defendant Duncan offered to transfer Malissa to another school but Ms. Davis declined the offer. Defendant Duncan also offered to isolate Defendant Mency from Malissa and Ms. Davis agreed that this was a good idea. After meeting with Defendant Duncan, Ms. Davis was satisfied that, even with Defendant Mency still at the school, her daughter was not in danger of being molested.

Based upon this evidence the Court concludes that the Plaintiffs have failed to carry their burden of producing sufficient evidence to satisfy the requirement that the School District or Defendant Duncan knew of Defendant Mency's actions or were deliberately indifferent to evidence that should have put them on notice. The fact that the school principal investigated a prior complaint is not notice of danger when the subject of the complaint was exonerated. To rule otherwise would punish the school for investigating complaints. The Plaintiffs have not put forth sufficient evidence for a jury to conclude that these Defendants either knew that Defendant Mency was harassing the Plaintiff or acted with reckless disregard to the possibility that he would do so. Therefore, Defendants are entitled to summary judgment as to Plaintiffs' Section 1983 claims.

C. State Claims

The Plaintiffs have also alleged various state claims including negligence, assault, battery, infliction of emotional distress, false imprisonment, and negligent hiring, retention and supervision. The DeKalb County School District is a political subdivision of the State of Georgia, and is vested with sovereign immunity unless such immunity is waived. *Wellborn v. DeKalb County School Dist.*, 227 Ga. App. 337, 379, 489 S.E.2d 345, 347 (1997); *Crisp County School System v. Brown*, 226 Ga. App. 800, 800-801, 487 S.E.2d 512, 514 (1997); *Coffee County School Dist. v. Snipes*, 216 Ga. App. 293-4, 454 S.E.2d 149 (1995). The Georgia Tort Claims Act (O.C.G.A. § 50-21-20, *et seq.*) provides for a limited waiver of the state's sovereign immunity for the torts of its officers and employees, but it expressly excludes school districts from the waiver. O.C.G.A. § 50-21-20(5). Therefore, the Georgia Tort Claims Act does not divest the School District of its sovereign immunity. Nor have the Plaintiffs cited any other statute that waives the School District's immunity. Only a legislative act that specifically states that sovereign immunity is waived and delineates the extent of that waiver effectively surrenders sovereign immunity. *Wellborn v. DeKalb County School Dist.*, 227 Ga. App. 379-80, 489 S.E.2d 345, 347; *Coffee*, 216 Ga. App. 293-4, 454 S.E.2d 149-150. The Plaintiffs have failed to show the existence of such an act. Therefore, the School District is immune from suit for the Plaintiffs' state claims.

While sovereign immunity applies to the state and its subdivisions and is intended to protect the public purse, official immunity is applicable to government officials and employees sued in their individual capacities. *Hemak v. Houston County School Dist.*, 220 Ga. App. 110, 112, 469 S.E.2d 679, 681 (1996). The doctrine of official immunity holds that an official is generally immune from suit when he or she erroneously exercises his or her judgment and by that injures someone. Such an official is immune if the acts complained of are performed within the scope of the officer's authority, and are performed without wilfulness, malice, or corruption. *Id.*; *Partain v. Maddox*, 131 Ga. App. 778, 782, 206 S.E.2d 618, 621 (1974). Official immunity protects officials from liability for honest mistakes in the exercise of their discretion. *Hemak*, 469 S.E.2d at 681.

The essence of the Plaintiff claims is that Defendant Duncan failed to use sound judgment when hiring, supervising and disciplining Defendant Mency and protecting Plaintiff. To determine whether an action is discretionary or ministerial, and therefore unprivileged, one must consider, on a case by case basis, the character of the complained of actions *Wright v. Ashe*, 220 Ga. App. 91, 93, 469 S.E.2d 268, 270-71 (1996). "A ministerial act is commonly one that is simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty. A discretionary act, however, calls for the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed." *Hemak v. Houston County School Dist.*, 220 Ga. App. 110, 469 S.E.2d 681 (1996). The Plaintiff claims that Defendant Duncan should have exercised better judgment when investigating and evaluating the Burrell incident and should have discovered Defendant Mency's molestation of

Plaintiff. The Court finds that disciplining employees and supervising students are discretionary functions and official immunity will shield Defendant Duncan absent evidence that his acts were wilful, malicious, or corrupt. *Crisp County School System v. Brown*, 226 Ga. App. 800, 803, 487 S.E.2d 512, 516 (1997) (holding teacher's duty to monitor students a discretionary function protected by official immunity). There is a total absence of any evidence of wilfulness or maliciousness. Therefore, Defendant Duncan is protected by official immunity.

III. CONCLUSION

For the reasons set forth above, the Court hereby **DENIES** Plaintiffs' Motion to Compel [36-1] and **DENIES** Plaintiff's Motion for Sanctions [36-2], **GRANTS** the Motion for Leave to Respond to Affidavit of Arnold Butler [48-1], **GRANTS** Defendant DeKalb County School District's Motion for Summary Judgment [53-1], **GRANTS** Defendant Duncan's Motion for Summary Judgment [55-1], **DENIES** Defendants' Motion to Appoint Guardian Ad Litem [57-1], **DENIES** Defendants' Motion to Clarify Order [58-1], **GRANTS** Defendants' Motion for Leave to Supplement Motion for Summary Judgment [60-1], **GRANTS** Defendants' Motion to Amend and Substitute Brief [75-1], **GRANTS** Plaintiffs' Motion to File a Supplemental Memorandum [76-1], and **DENIES** Defendants' Motion for Reconsideration [84-1]. The Plaintiff's Motions for Oral Argument [37 and 69] were **GRANTED** and the Court held oral argument on the pending motions on December 12, 1997. The Plaintiffs are directed to file a motion for summary judgment as to Defendant Mency within 20 days from the docketing of this order. If no motion for summary judgment is filed, the Court will consider the Plaintiffs' claims against said Defendant to be abandoned and the Clerk will be directed to close this case.

It is SO ORDERED, this 12 day of March, 1998.

s/ Thomas W. Thrash
THOMAS W. THRASH, JR.
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION IN *COLTON, et al. v. DEKALB COUNTY SCHOOL DISTRICT, et al.*, CIVIL ACTION NO. 1:97-CV-0491-TWT DATED AND FILED MARCH 12, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. 1:97-CV-0491-TWT

DIANNA COLTON, as legal guardian on behalf of
JANE DOE, individually,

Plaintiffs,

v.

DEKALB COUNTY SCHOOL DISTRICT, a Local Education Agency (LEA), WILLIAM L. DUNCAN, JR., in his Individual and Official Capacity as Principal of Knollwood Elementary School, KEVIN MENCY, in his Individual Capacity as former Teacher at Knollwood Elementary School,

Defendants.

ORDER

This case is before the Court on the Plaintiffs' Motion to Conduct Discovery Outside the Discovery Period [18-1], Defendant DeKalb County School District's Motion for Summary Judgment [26-1], Defendant Duncan's Motion for Summary Judgment [27-1], the Defendants' Motion to

Amend [30-1], the Plaintiffs' Motion to Exceed Page Limitation [31-1], the Defendants' Motion for Consideration of Motion for Summary Judgment [37-1], and the Defendants' Motion to Supplement Motion for Summary Judgment [43-1]. The Court denies as moot the Plaintiffs' Motion to Conduct Discovery Outside the Discovery Period. In the interests of justice the Court grants the Defendants' Motion to Amend, the Plaintiffs' Motion to Exceed Page Limitation, the Defendants' Motion for Consideration of Motion for Summary Judgment, and the Defendants' Motion to Supplement Motion for Summary Judgment.

I. FACTS

This case arises out of the acts of a physical education teacher, Defendant Kelvin Mency, at Knollwood Elementary School. The school is part of the DeKalb County School District. During the 1993-94 school year, Defendant Mency sexually molested at least three female students. Defendant William L. Duncan, Jr. was the principal at Knollwood Elementary when the sexual molestation took place. This action is brought on behalf of one of the three female students by her legal guardian. She is named in the Complaint as Jane Doe. She will be referred to herein as the Plaintiff.

During the 1993-1994 school year, the Plaintiff was a twelve-year-old seventh grade student at Knollwood Elementary. Defendant Mency was her physical education teacher and was the faculty advisor of the Safety Patrol, of which she was a member. The evidence shows that one morning Defendant Mency asked Plaintiff to help him raise the flag. He attempted to reach up under her skirt and fondle her but she pushed his hand away. Approximately two months later, Mency attempted to grab Plaintiff's backside while she was carrying physical education equipment from the playing field to the gym. Plaintiff again pushed Mency's hand away and walked away from him. On another occasion when Plaintiff was helping Mency with the physical education equipment, he attempted to reach down the neck of her shirt and touch her breasts. There is no evidence that anyone ever witnessed any of these events. Plaintiff did not tell anyone about Mency's actions until the end of the year when she told a fellow student. There is no evidence that this other student ever told anyone about Mency's actions. Plaintiff never told her mother, or anyone at the school, about what was happening between her and Mency. The police began investigating Mency when another student confided in a friend that Defendant Mency was touching her inappropriately. Defendant Mency was subsequently convicted of child molestation and sentenced to 20 years in prison.

The three students Mency molested have filed separate actions against Mency, Duncan, and the DeKalb County School District [hereinafter "the School District"] alleging violations of 20 U.S.C. § 1681 [commonly known as Title IX], 42 U.S.C.A. § 1983 [commonly known as Section 1983], and various state laws. Defendant Duncan and the School District have moved for summary judgment on all counts.

II. DISCUSSION

Summary judgment is appropriate only when the pleadings, depositions, and affidavits submitted by the parties show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The court should view the evidence and any inferences that may be drawn in the light most favorable to the non movant. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 158-159, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970). The party seeking summary judgment must first identify grounds that show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). The burden then shifts to the non-movant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact exists. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986).

A. The Plaintiffs' Title IX Claim

The Plaintiffs assert that the School District violated Title IX by failing to prevent Defendant Mency from molesting Plaintiff. Title IX provides that "no person in the United States shall, on the basis of sex, . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ." 20 U.S.C. § 1681(a). In *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992), the Supreme Court recognized an implied private cause of action for money damages in Title IX cases of intentional sexual discrimination. The Court held that sexual harassment is one form of sexual discrimination. *Id.*

There is disagreement about the standard that applies to institutional liability for sexual harassment under Title IX. Some courts have held that an educational institution is liable when a teacher intentionally harasses a student because of sex regardless of whether the school or school district has knowledge of the harassment. *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 901 (1st Cir. 1988); *Does 1,2,3,4 v. Covington County School Bd.*, 969 F. Supp. 1264, 1277 (M.D. Ala. 1997); *Kadiki v. Virginia Commonwealth University*, 892 F. Supp. 746, 751 (E.D. Va. 1995). This approach is based at least in part on the Supreme Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), where the Supreme Court concluded that agency rules, specifically *respondeat superior*, could support institutional liability under Title VII. Other courts have rejected the general application of *respondeat superior* to Title IX cases. *Doe v. Lago Vista Independent School Dist.*, 106 F.3d 1223 (5th Cir. 1997), *cert. granted in Jean Doe, Jane Doe, a Minor v. Lago Vista Independent School District*, __ U.S. __, 118 S.Ct. 595, 1997 WL 291406 (U.S. Dec. 05, 1997) (rejecting agency liability for sexual harassment cases under Title IX); *Smith v. Metropolitan School Dist. Perry Tp.*, 128 F.3d 1014 (7th Cir. 1997) (rejecting agency liability under Title IX because of lack of agency language and because Spending Clause requires intent for Title IX claims). Other courts, while not rejecting outright application of agency principles, have limited their application in Title IX cases. *Lipsett*, 864 F.2d at 897 (limiting its application of Title VII precedent to Title IX cases for employment discrimination).

A recent decision, cited by counsel at oral argument, suggested that the Eleventh Circuit would join the ranks of courts that refuse to apply agency principles in Title IX cases. *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th

Cir. 1997) (pet. for cert. filed, 66 U.S.L.W. 3387 (Nov. 19, 1997)). An even more recent Eleventh Circuit decision, handed down after oral argument, unequivocally states that this is true. In *Floyd v. Waiters*, No. 94-8667, __ F.3d __, 1998 WL 17093 (11th Cir. Jan. 20, 1998), the Eleventh Circuit explicitly rejected agency liability as a basis for Title IX claims. In so doing, the *Floyd* Court not only rejected the imputation of liability from a harassing teacher to his or her supervisor, but also rejected the imputation of liability from a supervisor to the school board or superintendent. *Id.* at *1-4. Therefore, the current rule in the Eleventh Circuit is that there must be actual notice of the sexual harassment to the school board or to the school superintendent in order for there to be a claim against the school system under Title IX.[1] Because there is a total absence of such evidence in this case, the Plaintiffs cannot recover under Title IX.

Even under a less demanding standard, the Defendants (other than Mency) would be entitled to summary judgment. As discussed below, there is simply no evidence that any school official with supervisory authority knew of or should have known that Mency was molesting the three students. There is no evidence that the school system was deliberately indifferent to knowledge or information that would have put it on notice that Defendant Mency was molesting the three students. It is clear from *Davis* that the school system must be on notice before it can be held liable for intentional discrimination based on sex. In this case, no one knew about the sexual molestation of the three students except Defendant Mency and his victims. Therefore, there can be no basis for Title IX liability against the school system.

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[1] On March 13, 1997, the Department of Education's Office of Civil Rights issued a document called "Sexual Harassment Guidance." The Guidance states that, for Title IX purposes, a school will have actual notice of sexual harassment whenever an agent or responsible employee has notice. The Eleventh Circuit did note that this Guidance might change the application of agency principals in Title IX cases that arise after March 13, 1997. *Floyd*, at *2 n.7. This case arose before March 13, 1997, and therefore the standard set forth in *Floyd* is binding precedent as to this case.

B. The Plaintiffs' Section 1983 Claims

The Plaintiffs claim that by not preventing Mency from molesting Plaintiff the School District and Mr. Duncan violated Section 1983. Respondeat superior is not available as a theory of liability in a Section 1983 action. *Monnell v. Dept. of Social Services*, 436 U.S. 658, 691-92 (1978). In order for liability to attach, the Defendants must have either known or should have known that Mr. Mency posed a danger to Plaintiff. *See e.g.*, *Floyd*, at *7 ("a 'custom' requires that policymaking officials knew about the widespread practice but failed to stop it."); *Lancaster v. Monroe County, Ala.*, 116 F.3d 1419, 1424 (11th Cir. 1997) (requiring knowledge of danger to safety or health for violation of Section 1983); *Cottrell v. Caldwell*, 85 F.3d 1480, 1491 (11th Cir. 1996) (same). Therefore, to prevail on their claims against the School District or Defendant Duncan under Section 1983 the Plaintiffs must show that these Defendants either knew that Defendant Mency was a danger to the students or were deliberately indifferent to that danger after being put on notice of the danger.

The evidence does not show that Defendant Mency's actions toward Plaintiff were such that the Defendants knew that he was a danger to her. None of the students, including Plaintiff in this case, reported that Mency was molesting them. The testimony shows that most of the inappropriate contact between Mency and the students took place in secret, where no one could have observed what Mency was doing. Furthermore, to the extent that it occurred where anyone could have seen it, there is no evidence that anyone actually did see Mency molest any of the students or that they reported what they saw if they did. There is no evidence that the Defendants knew that Mency was molesting these students.

Nor was there a reason for these Defendants to believe that Defendant Mency was a substantial threat to students. The Plaintiffs argue that the Defendants knew that Mr. Mency was a danger because of a complaint filed by a student who is not a party to this case. In November of 1993, another Knollwood student, Ms. Malissa Dan'Yell Burrell, was playing center in a touch football game. Defendant Mency was playing quarterback. At some point, Defendant Mency touched Ms. Burrell on her behind. Ms. Burrell also believed that, following the football game, Defendant Mency attempted to touch her inappropriately when she was near the water fountain, but she moved away before he could. The following day, Ms. Burrell and her guardian, Helen Davis, came to school to discuss Defendant Mency's actions with Defendant Duncan.

Defendant Duncan directed Yvonne Butler, the school counselor, and Corrie Wingfield, the school social worker, to investigate Ms. Burrell's allegations. During their investigation Ms. Wingfield and Ms. Butler met with Ms. Burrell and another student regarding the complaint. Mency denied doing anything inappropriate. Upon conclusion of their investigation, Ms. Wingfield and Ms. Wingfield concluded that the Burrell incident was not sexual in nature. In a subsequent meeting, Defendant Duncan met with Ms. Davis, Ms. Burrell, and Defendant Mency to discuss the situation. Defendant Duncan offered to transfer Malissa to another school but Ms. Davis declined the offer. Defendant Duncan also offered to isolate Defendant Mency from Malissa and Ms. Davis agreed that this was a good idea. After meeting with Defendant Duncan, Ms. Davis was satisfied that, even with Defendant Mency still at the school, her daughter was not in danger of being molested.

Based upon this evidence the Court concludes that the Plaintiffs have failed to carry their burden of producing sufficient evidence to satisfy the requirement that the School District or Defendant Duncan knew of Defendant Mency's actions or were deliberately indifferent to evidence that should have put them on notice. The fact that the school principal investigated a prior complaint is not notice of danger when the subject of the complaint was exonerated. To rule otherwise would punish the school for investigating complaints. The Plaintiffs have not put forth sufficient evidence for a jury to conclude that these Defendants either knew that Defendant Mency was harassing the Plaintiff or acted with reckless disregard to the possibility that he would do so. Therefore, Defendants are entitled to summary judgment as to Plaintiffs' Section 1983 claims.

C. State Claims

The Plaintiffs have also alleged various state claims including negligence, assault, battery, infliction of emotional distress, false imprisonment, and negligent hiring, retention and supervision. The DeKalb County School District is a political subdivision of the State of Georgia, and is vested with sovereign immunity unless such immunity is waived. *Wellborn v. DeKalb County School Dist.*, 227 Ga. App. 337, 379, 489 S.E.2d 345, 347 (1997); *Crisp County School System v. Brown*, 226 Ga. App. 800, 800-801, 487 S.E.2d 512, 514 (1997); *Coffee County School Dist. v. Snipes*, 216 Ga. App. 293-4, 454 S.E.2d 149 (1995). The Georgia Tort Claims Act (O.C.G.A. § 50-21-20, *et seq.*) provides for a limited waiver of the state's sovereign immunity for the torts of its officers and employees, but it expressly excludes school districts from the waiver. O.C.G.A. § 50-21-20(5). Therefore, the Georgia Tort Claims Act does not divest the School District of its sovereign immunity. Nor have the Plaintiffs cited any other statute that waives the School District's immunity. Only a legislative act that specifically states that sovereign immunity is waived and delineates the extent of that waiver effectively surrenders sovereign immunity. *Wellborn v. DeKalb County School Dist.*, 227 Ga. App. 379-80, 489 S.E.2d 345, 347; *Coffee*, 216 Ga. App. 293-4, 454 S.E.2d 149-150. The Plaintiffs have failed to show the existence of such an act. Therefore, the School District is immune from suit for the Plaintiffs' state claims.

While sovereign immunity applies to the state and its subdivisions and is intended to protect the public purse, official immunity is applicable to government officials and employees sued in their individual capacities. *Hemak v. Houston County School Dist.*, 220 Ga. App. 110, 112, 469 S.E.2d 679, 681 (1996). The doctrine of official immunity holds that an official is generally immune from suit when he or she erroneously exercises his or her judgment and by that injures someone. Such an official is immune if the acts complained of are performed within the scope of the officer's authority, and are performed without wilfulness, malice, or corruption. *Id.*; *Partain v. Maddox*, 131 Ga. App. 778, 782, 206 S.E.2d 618, 621 (1974). Official immunity protects officials from liability for honest mistakes in the exercise of their discretion. *Hemak*, 469 S.E.2d at 681.

The essence of the Plaintiff claims is that Defendant Duncan failed to use sound judgment when hiring, supervising and disciplining Defendant Mency and protecting Plaintiff. To determine whether an action is discretionary or ministerial, and therefore unprivileged, one must consider, on a case by case basis, the character of the complained of actions *Wright v. Ashe*, 220 Ga. App. 91, 93, 469 S.E.2d 268, 270-71 (1996). "A ministerial act is commonly one that is simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty. A discretionary act, however, calls for the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed." *Hemak v. Houston County School Dist.*, 220 Ga. App. 112, 469 S.E.2d 681 (1996). The Plaintiff claims that Defendant Duncan should have exercised better judgment when investigating and evaluating the Burrell incident and should have discovered Defendant Mency's molestation of Plaintiff. The Court finds that disciplining employees and supervising students are discretionary functions and official immunity will shield Defendant Duncan absent evidence that his acts were wilful, malicious, or corrupt. *Crisp County*

School System v. Brown, 226 Ga. App. 800, 803, 487 S.E.2d 512, 516 (1997) (holding teacher's duty to monitor students a discretionary function protected by official immunity). There is a total absence of any evidence of wilfulness or maliciousness. Therefore, Defendant Duncan is protected by official immunity.

III. CONCLUSION

For the reasons set forth above, the Court hereby **DENIES** the Plaintiff's Motion to Conduct Discovery Outside Discovery Period [18-1], **GRANTS** Defendant DeKalb County School District's Motion for Summary Judgment [26-1], **GRANTS** Defendant Duncan's Motion for Summary Judgment [27-1], **GRANTS** the Defendants' Motion to Amend [30-1], **GRANTS** the Plaintiff's Motion to Exceed Page Limitation [31-1], **GRANTS** the Defendants' Motion for Consideration of Motion for Summary judgment [37-1], and **GRANTS** the Defendants' Motion to Supplement Motion for Summary Judgment [43-1]. Plaintiffs are directed to file a motion for summary judgment as to Defendant Mency within 20 days from the docketing of this order. If no motion for summary judgment is filed, the Court will consider the Plaintiffs' claims against said Defendant to be abandoned and the Clerk will be directed to close this case.

It is SO ORDERED, this 12 day of March, 1998.

s/ Thomas W. Thrash
THOMAS W. THRASH, JR.
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION IN *LINDSEY, et al. v. DEKALB COUNTY SCHOOL DISTRICT, et al.*, CIVIL ACTION NO. 1:97-CV-0382-TWT DATED AND FILED MARCH 12, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. 1:97-CV-0382-TWT

VICKI LINDSEY, as legal guardian on behalf of
JANE DOE, individually,

Plaintiffs,

v.

DEKALB COUNTY SCHOOL DISTRICT, a Local Education Agency (LEA), WILLIAM L. DUNCAN, JR., in his Individual and Official Capacity as Principal of Knollwood Elementary School, KEVIN MENCY, in his Individual Capacity as former Teacher at Knollwood Elementary School,

Defendants.

ORDER

This case is before the Court on the Plaintiffs' Motion to Conduct Discovery Outside the Discovery Period [18-1], the Defendant Duncan's Motion for Summary Judgment [24-1], the Defendant DeKalb County School District's

Motion for Summary Judgment [25-1], the Defendants' Motion to Amend [28-1], the Plaintiffs' Motion to Exceed Page Limitation [29-1], Motion by the Defendants for Consideration of Motion for Summary Judgment [35-1], and the Defendants' Motion to Supplement Motion for Summary Judgment [41-1]. The Court denies as moot the Plaintiffs' Motion to Conduct Discovery Outside the Discovery Period. In the interests of justice the Court grants the Defendants' Motion to Amend, the Plaintiffs' Motion to Exceed Page Limitation, Motion by the Defendants for Consideration of Motion for Summary Judgment, and the Defendants' Motion to Supplement Motion for Summary Judgment.

I. FACTS

This case arises out of the acts of a physical education teacher, Defendant Kelvin Mency, at Knollwood Elementary School. The school is part of the DeKalb County School District. During the 1993-94 school year, Defendant Mency sexually molested at least three female students. Defendant William L. Duncan, Jr. was the principal at Knollwood Elementary when the sexual molestation took place. This action is brought on behalf of one of the three female students by her legal guardian. She is named in the Complaint as Jane Doe. She will be referred to herein as the Plaintiff.

During the 1993-94 school year, the Plaintiff was a twelve-year-old seventh grade student at Knollwood Elementary. Defendant Mency was her seventh grade physical education teacher. The evidence shows that early in 1994 as Plaintiff was returning from gym class, Defendant Mency asked her if she would kiss him. The Plaintiff's only response was to look at Mency as though he were crazy and then walk away. On another occasion, Plaintiff was attending an evening P.T.A. meeting with her mother. At some point Mency instructed Plaintiff to go into a vacant classroom and wait. A few minutes later he joined her and kissed her while fondling her backside. The Plaintiff then walked out of the room without saying anything to Mency. On another occasion while Plaintiff was talking to Mency in the physical education equipment room, he kissed her, exposed himself, and told her to manually bring him to orgasm. When Plaintiff refused, Mency masturbated in front of her. When he had finished, Plaintiff left the room. The evidence also shows that one evening in early May of 1994, Mency told Plaintiff to wait for him in a teacher's bathroom. After he arrived, he turned out the light, the Plaintiff, fondled her breasts, unfastened his pants, and put her hands on his penis. At that point Plaintiff took her hand away and left. Finally, the evidence shows that the following year, after Plaintiff had graduated from Knollwood Elementary, she came back to the school to pick something up. As she was leaving, Mency offered to drive her home. He instructed the Plaintiff to wait for him away from the school so that no one would see her get into his car. She did as he asked. After picking her up, Mency drove to a church parking lot where he kissed her and rubbed her vagina through her clothes. He then drove Plaintiff to a street near her house and dropped her off so that she could walk home.

There is no evidence that anyone witnessed any of these events. Plaintiff did not tell anyone about Mency's actions until after the 1993-94 school year when she confided in a friend that Mency was touching her inappropriately. The friend told a police officer who regularly lectured at the school. The police then began an investigation into Mency's contact with various students. During this investigation Yvonne Butler, a school counselor, questioned Plaintiff about Mency's actions and Plaintiff told her that Mency had molested her. Ultimately, Defendant Mency was indicted, convicted of child molestation, and sentenced to prison for 20 years.

The three students Mency molested have filed separate actions against Mency, Duncan, and the DeKalb County School District [hereinafter "the School District"] alleging violations of 20 U.S.C. § 1681 [commonly known as Title IX], 42 U.S.C.A. § 1983 [commonly known as Section 1983], and various state laws. Defendant Duncan and the School District have moved for summary judgment on all counts.

II. DISCUSSION

Summary judgment is appropriate only when the pleadings, depositions, and affidavits submitted by the parties show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The court should view the evidence and any inferences that may be drawn in the light most favorable to the non movant. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 158-159, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970). The party seeking summary judgment must first identify grounds that show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). The burden then shifts to the non-movant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact exists. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986).

A. The Plaintiffs' Title IX Claim

The Plaintiffs assert that the School District violated Title IX by failing to prevent Defendant Mency from molesting Plaintiff. Title IX provides that "no person in the United States shall, on the basis of sex, . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ." 20 U.S.C. § 1681(a). In *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992), the Supreme Court recognized an implied private cause of action for money damages in Title IX cases of intentional sexual discrimination. The Court held that sexual harassment is one form of sexual discrimination. *Id.*

There is disagreement about the standard that applies to institutional liability for sexual harassment under Title IX. Some courts have held that an educational institution is liable when a teacher intentionally harasses a student because of sex regardless of whether the school or school district has knowledge of the harassment. *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 901 (1st Cir. 1988); *Does 1,2,3,4 v. Covington County School Bd.*, 969 F. Supp. 1264, 1277 (M.D. Ala. 1997); *Kadiki v. Virginia Commonwealth University*, 892 F. Supp. 746, 751 (E.D. Va. 1995). This approach is based at least in part on the Supreme Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), where the Supreme Court concluded that agency rules, specifically *respondeat superior*, could support institutional liability under Title VII. Other courts have rejected the general application of *respondeat superior* to Title IX cases. *Doe v. Lago Vista Independent School Dist.*, 106 F.3d 1223 (5th Cir. 1997), *cert. granted in Jean Doe, Jane Doe, a Minor v. Lago Vista Independent School District*, __ U.S. __, 118 S.Ct. 595, 1997 WL 291406 (U.S. Dec. 05, 1997) (rejecting agency liability for sexual harassment cases under Title IX); *Smith v. Metropolitan School Dist. Perry Tp.*, 128 F.3d 1014 (7th Cir. 1997) (rejecting agency liability under Title IX because of lack of agency language and because Spending Clause requires intent for Title IX claims). Other courts, while not rejecting outright application of agency principles, have limited their application in Title IX cases. *Lipsett*, 864 F.2d at 897 (limiting its application of Title VII precedent to Title IX cases for employment discrimination).

A recent decision, cited by counsel at oral argument, suggested that the Eleventh Circuit would join the ranks of courts that refuse to apply agency principles in Title IX cases. *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997) (pet. for cert. filed, 66 U.S.L.W. 3387 (Nov. 19, 1997)). An even more recent Eleventh Circuit decision, handed down after oral argument, unequivocally states that this is true. In *Floyd v. Waiters*, No. 94-8667, __ F.3d __, 1998 WL 17093 (11th Cir. Jan. 20, 1998), the Eleventh Circuit explicitly rejected agency liability as a basis for Title IX claims. In so doing, the *Floyd* Court not only rejected the imputation of liability from a harassing teacher to his or her supervisor, but also rejected the imputation of liability from a supervisor to the school board or superintendent. *Id.* at *1-4.

Therefore, the current rule in the Eleventh Circuit is that there must be actual notice of the sexual harassment to the school board or to the school superintendent in order for there to be a claim against the school system under Title IX.[1] Because there is a total absence of such evidence in this case, the Plaintiffs cannot recover under Title IX.

Even under a less demanding standard, the Defendants (other than Mency) would be entitled to summary judgment. As discussed below, there is simply no evidence that any school official with supervisory authority knew of or should have known that Mency was molesting the three students. There is no evidence that the school system was deliberately indifferent to knowledge or information that would have put it on notice that Defendant Mency was molesting the three students. It is clear from *Davis* that the school system must be on notice before it can be held liable for intentional discrimination based on sex. In this case, no one knew about the sexual molestation of the three students except Defendant Mency and his victims. Therefore, there can be no basis for Title IX liability against the school system.

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[1] On March 13, 1997, the Department of Education's Office of Civil Rights issued a document called "Sexual Harassment Guidance." The Guidance states that, for Title IX purposes, a school will have actual notice of sexual harassment whenever an agent or responsible employee has notice. The Eleventh Circuit did note that this Guidance might change the application of agency principals in Title IX cases that arise after March 13, 1997. *Floyd*, at *2 n.7. This case arose before March 13, 1997, and therefore the standard set forth in *Floyd* is binding precedent as to this case.

B. The Plaintiffs' Section 1983 Claims

The Plaintiffs claim that by not preventing Mency from molesting Plaintiff the School District and Mr. Duncan violated Section 1983. Respondeat superior is not available as a theory of liability in a Section 1983 action. *Monnell v. Dept. of Social Services*, 436 U.S. 658, 691-92 (1978). In order for liability to attach, the Defendants must have either known or should have known that Mr. Mency posed a danger to Plaintiff. *See e.g.*, *Floyd*, at *7 ("a 'custom' requires that policymaking officials knew about the widespread practice but failed to stop it."); *Lancaster v. Monroe County, Ala.*, 116 F.3d 1419, 1424 (11th Cir. 1997) (requiring knowledge of danger to safety or health for violation of Section 1983); *Cottrell v. Caldwell*, 85 F.3d 1480, 1491 (11th Cir. 1996) (same). Therefore, to prevail on their claims against the School District or Defendant Duncan under Section 1983 the Plaintiffs must show that these Defendants either knew that Defendant Mency was a danger to the students or were deliberately indifferent to that danger after being put on notice of the danger.

The evidence does not show that Defendant Mency's actions toward Plaintiff were such that the Defendants knew that he was a danger to her. None of the students, including Plaintiff in this case, reported that Mency was molesting them. The testimony shows that most of the inappropriate contact between Mency and the students took place in secret, where no one could have observed what Mency was doing. Furthermore, to the extent that it occurred where anyone could have seen it, there is no evidence that anyone actually did see Mency molest any of the students or that they reported what they saw if they did. There is no evidence that the Defendants knew that Mency was molesting these students.

Nor was there a reason for these Defendants to believe that Defendant Mency was a substantial threat to students. The Plaintiffs argue that the Defendants knew that Mr. Mency was a danger because of a complaint filed by a student who is not a party to this case. In November of 1993, another Knollwood student, Ms. Malissa Dan'Yell Burrell, was playing center in a touch football game. Defendant Mency was playing quarterback. At some point, Defendant Mency touched Ms. Burrell on her behind. Ms. Burrell also believed that, following the football game, Defendant Mency attempted to touch her inappropriately when she was near the water fountain, but she moved away before he could. The following day, Ms. Burrell and her guardian, Helen Davis, came to school to discuss Defendant Mency's actions with Defendant Duncan.

Defendant Duncan directed Yvonne Butler, the school counselor, and Corrie Wingfield, the school social worker, to investigate Ms. Burrell's allegations. During their investigation Ms. Wingfield and Ms. Butler met with Ms. Burrell and another student regarding the complaint. Mency denied doing anything inappropriate. Upon conclusion of their investigation, Ms. Wingfield and Ms. Wingfield concluded that the Burrell incident was not sexual in nature. In a subsequent meeting, Defendant Duncan met with Ms. Davis, Ms. Burrell, and Defendant Mency to discuss the situation. Defendant Duncan offered to transfer Malissa to another school but Ms. Davis declined the offer. Defendant

Duncan also offered to isolate Defendant Mency from Malissa and Ms. Davis agreed that this was a good idea. After meeting with Defendant Duncan, Ms. Davis was satisfied that, even with Defendant Mency still at the school, her daughter was not in danger of being molested.

Based upon this evidence the Court concludes that the Plaintiffs have failed to carry their burden of producing sufficient evidence to satisfy the requirement that the School District or Defendant Duncan knew of Defendant Mency's actions or were deliberately indifferent to evidence that should have put them on notice. The fact that the school principal investigated a prior complaint is not notice of danger when the subject of the complaint was exonerated. To rule otherwise would punish the school for investigating complaints. The Plaintiffs have not put forth sufficient evidence for a jury to conclude that these Defendants either knew that Defendant Mency was harassing the Plaintiff or acted with reckless disregard to the possibility that he would do so. Therefore, Defendants are entitled to summary judgment as to Plaintiffs' Section 1983 claims.

C. State Claims

The Plaintiffs have also alleged various state claims including negligence, assault, battery, infliction of emotional distress, false imprisonment, and negligent hiring, retention and supervision. The DeKalb County School District is a political subdivision of the State of Georgia, and is vested with sovereign immunity unless such immunity is waived. *Wellborn v. DeKalb County School Dist.*, 227 Ga. App. 337, 379, 489 S.E.2d 345, 347 (1997); *Crisp County School*

System v. Brown, 226 Ga. App. 800, 800-801, 487 S.E.2d 512, 514 (1997); *Coffee County School Dist. v. Snipes*, 216 Ga. App. 293-4, 454 S.E.2d 149 (1995). The Georgia Tort Claims Act (O.C.G.A. § 50-21-20, *et seq*.) provides for a limited waiver of the state's sovereign immunity for the torts of its officers and employees, but it expressly excludes school districts from the waiver. O.C.G.A. § 50-21-20(5). Therefore, the Georgia Tort Claims Act does not divest the School District of its sovereign immunity. Nor have the Plaintiffs cited any other statute that waives the School District's immunity. Only a legislative act that specifically states that sovereign immunity is waived and delineates the extent of that waiver effectively surrenders sovereign immunity. *Wellborn v. DeKalb County School Dist.*, 227 Ga. App. 379-80, 489 S.E.2d 345, 347; *Coffee*, 216 Ga. App. 293-4, 454 S.E.2d 149-150. The Plaintiffs have failed to show the existence of such an act. Therefore, the School District is immune from suit for the Plaintiffs' state claims.

While sovereign immunity applies to the state and its subdivisions and is intended to protect the public purse, official immunity is applicable to government officials and employees sued in their individual capacities. *Hemak v. Houston County School Dist.*, 220 Ga. App. 110, 112, 469 S.E.2d 679, 681 (1996). The doctrine of official immunity holds that an official is generally immune from suit when he or she erroneously exercises his or her judgment and by that injures someone. Such an official is immune if the acts complained of are performed within the scope of the officer's authority, and are performed without wilfulness, malice, or corruption. *Id.*; *Partain v. Maddox*, 131 Ga. App. 778, 782, 206 S.E.2d 618, 621 (1974). Official immunity protects officials from liability for honest mistakes in the exercise of their discretion. *Hemak*, 469 S.E.2d at 681.

The essence of the Plaintiff claims is that Defendant Duncan failed to use sound judgment when hiring, supervising and disciplining Defendant Mency and protecting Plaintiff. To determine whether an action is discretionary or ministerial, and therefore unprivileged, one must consider, on a case by case basis, the character of the complained of actions *Wright v. Ashe*, 220 Ga. App. 91, 93, 469 S.E.2d 268, 270-71 (1996). "A ministerial act is commonly one that is simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty. A discretionary act, however, calls for the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed." *Hemak v. Houston County School Dist.*, 220 Ga. App. 112, 469 S.E.2d 681 (1996). The Plaintiff claims that Defendant Duncan should have exercised better judgment when investigating and evaluating the Burrell incident and should have discovered Defendant Mency's molestation of Plaintiff. The Court finds that disciplining employees and supervising students are discretionary functions and official immunity will shield Defendant Duncan absent evidence that his acts were wilful, malicious, or corrupt. *Crisp County School System v. Brown*, 226 Ga. App. 800, 803, 487 S.E.2d 512, 516 (1997) (holding teacher's duty to monitor students a discretionary function protected by official immunity). There is a total absence of any evidence of wilfulness or maliciousness. Therefore, Defendant Duncan is protected by official immunity.

III. Conclusion

For the reasons set forth above, the Court hereby **DENIES** the Plaintiff's Motion to Conduct Discovery Outside the Discovery Period [18-1], **GRANTS** the Defendant Duncan's Motion for Summary Judgment [24-1], **GRANTS** the Defendant DeKalb County School District's Motion for Summary Judgment [25-1], **GRANTS** the Defendants' Motion to Amend [28-1], **GRANTS** the Plaintiff's Motion to Exceed Page Limitation [29-1], **GRANTS** Motion by the Defendants for Consideration of Motion for Summary Judgment [35-1], and **GRANTS** the Defendants' Motion to Supplement Motion for Summary Judgment [41-1]. Plaintiffs are directed to file a motion for summary judgment as to Defendant Mency within 20 days from the docketing of this order. If no motion for summary judgment is filed, the Court will consider the Plaintiff's claims against said Defendant to be abandoned and the Clerk will be directed to close this case.

It is SO ORDERED, this 12 day of March, 1998.

s/ Thomas W. Thrash
THOMAS W. THRASH
United States District Judge

APPENDIX E — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JANUARY 8, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-14455-GG

EDITH DAVIS, as Legal Guardian on behalf of
JANE DOE, individually,

Plaintiff-Appellant,

versus

DEKALB COUNTY SCHOOL DISTRICT, a Local Education Agency (LEA), WILLIAM L. DUNCAN, JR., in his Individual and Official Capacity as Principal of Knollwood Elementary School,

Defendants-Appellees,

No. 99-14456-GG

VICKI LINDSEY, individually and as Legal Guardian
on behalf of Jane Doe, Individually,

Plaintiff-Appellant,

versus

Appendix E

DEKALB COUNTY SCHOOL DISTRICT, a Local Education Agency (LEA), WILLIAM L. DUNCAN, JR., in his Individual and Official Capacity as Principal of Knollwood Elementary School,

Defendants-Appellees.

No. 99-14457-GG

DIANNA COLTON, Individually and as Legal Guardian on behalf of Jane Doe, Individually,

Plaintiff-Appellant,

versus

DEKALB COUNTY SCHOOL DISTRICT, a Local Education Agency (LEA), WILLIAM L. DUNCAN, JR., in his Individual and Official Capacity as Principal of Knollwood Elementary School,

Defendants-Appellees

On Appeal from the United States District Court for the Northern District of Georgia

Before COX, BLACK and FAY, Circuit Judges.

PER CURIAM:

The petition for rehearing filed by Edith Davis, individually, and as Legal Guardian on behalf of Jane Doe, Individually, et al., is DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX F — RELEVANT STATUTE

20 U.S.C. § 1681

§ 1681. Sex

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

> (1) Classes of educational institutions subject to prohibition
>
> in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;
>
> (2) Educational institutions commencing planned change in admissions
>
> in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or (B) for seven years from the date an

educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets

this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy

in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations

this section shall not apply to membership practices —

> (A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or
>
> (B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences

this section shall not apply to —

> (A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for —

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to

> individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: Provided, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) "Educational institution" defined

For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

APPENDIX G — SCHOOL POLICY

DEKALB COUNTY SCHOOLS

DEALING WITH ALLEGATIONS BY STUDENTS OR PARENTS OF MISCONDUCT BY STAFF MEMBERS

I. Types of Misconduct and Legal References

A. Physical Abuse/Assault and Battery [State Law]

B. Sexual Battery [State Law]

C. Verbal Abuse/Profanity/Unprofessional Comments [Personnel Manual 45-200]

D. Racial, Gender, or Other Forms of Discrimination [DeKalb Policy Code 3475]

E. Sexual Harassment [DeKalb Policy Code 7560]

II. Investigation Guidelines

A. The principal will confer with complainant and secure a copy of the complaint in writing.

B. The principal will discuss the complaint with the staff member involved and determine the validity of the allegation. The principal will also secure a written statement from the staff member.

C. The principal will call the area executive director promptly for consultation.

D. If there is reasonable cause to believe that a student has been sexually or physically abused, the principal will call the social worker and the school detective on the day the incident is reported. In cooperation with the social worker and police authorities, the principal will handle the school-level investigation. If appropriate, the principal may assign the responsibility to his or her designee.

1. The principal will cooperate fully with police authorities in their investigation.

2. The principal may utilize the social worker to interview each student and adult having knowledge of or witnessing the event and secure a written statement from each. Sign and date.

3. In cases of sexual and physical abuse, the social worker will call DFACS and the principal will follow up with a letter to same. [See OCGA § 19-7-5]

4. The principal shall provide a written summary of the interviews to the area executive director.

E. The principal, while following normal procedures of parent notification, will secure medical treatment for the student if necessary.

F. All investigations will be coordinated and supervised by the principal, as follows:

Appendix G

1. The principal will record all pertinent data including time of day, dates, location, witnesses, etc. Photographs of the evidence or injuries, if available, may also be useful in the investigation.

2. The principal will ensure that both student and adult witnesses are interviewed and will secure a written statement from each. This should be done as soon after the incident as possible.

G. The principal will submit a recommendation to the area executive director regarding a course of action. The action will be based on the severity of the offense and/or the repetitive nature of the offense. The following is a listing of possible administrative actions.

1. Administrative conference with principal and verbal direction.

2. Administrative conference with principal and GTDRI.

3. Letter of direction from principal.

4. Letter of reprimand from principal. In cases of repeat offenses, the letter of direction or reprimand should come from a higher authority.

5. Deletion or reassignment of duties within the school.

6. Reassignment of work location within the school.

7. Administrative/mediation conference with higher level administrator.

8. Refer staff member to Employee Assistance Program.

9. Transfer staff member to another work site.

10. The superintendent may bring written charges, suspend employee, and schedule a Board hearing.

H. The principal will conduct a conference with the staff member in a timely manner regarding resolution of the allegation and actions taken.

III. Administrative Response to the Complainant

A. The principal will comply with Board Policy Code 8425 in regard to processing, time constraints, and responding to the student/parent complaint.

B. The principal will communicate with the complainant regarding resolution of the complaint and action taken.

C. The area executive director will effect a follow-up communication, if appropriate.

Approved: August 10, 1994